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SELECT CASES

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OTHER AUTHORITIES

ON

THE LAW OF WILLS

AND

ADMINISTRATION

BY

JOSEPH WARREN

PROFESSOR OF LAW IN HARVARD UNIVERSITY

LANGDELL HALL, CAMBRIDGE
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PREFACE

THROUGH the generosity of the late Professor John C. Gray, who by his will left the copyright of his case-books on Property to the President and Fellows of Harvard College for the benefit of the Law School, the editor has been able to make free use of the arrangement and valuable material of the fourth volume of that series. Not only has the general plan of that book been followed, but several of Professor Gray's notes on the older parts of the law have been reprinted here with due acknowledgment. Moreover, on a few occasions the abbreviated statements of fact drawn by him have been adopted for this collection. Attention has been called to such instances by foot notes.

The editor is also indebted to the Syndics of the University Press of Cambridge, England, for permission to print on pages 666, 667, 731 the extracts from Maitland's Equity; and to his learned friends, Albert M. Kales and John P. Wilson, Jr., of the Chicago Bar, Adelbert E. Buffum of the Massachusetts Bar, and Grenville Clark and Alfred C. Intemann of the New York Bar for material assistance on the Forms appearing in the Appendix.

The names and arguments of counsel have, with a few exceptions, been omitted. Other omissions are duly indicated.

JOSEPH WARREN.

CAMBBRIDGE, December 1, 1916.

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SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF WILLS AND ADMINISTRATION

CHAPTER I.

ESCHEAT.

Lit. § 348. Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

Co. Lit. 13 a. *Escheat, eschaeta*, is a word of art, and derived from the French word *escheat (id est) cadere, excidere* or *accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiæ* or *terræ excadentiales*. "Dominus vero capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi." And Ockam (who wrote in the reign of Henry the Second) treating of tenures of the king, saith, "porro eschaetæ vulgo dicuntur, quæ decedentibus hiis qui de rege tenent, &c., cum non existit ratione sanguinis hæres, ad fiscum relabuntur." So as an escheat doth happen two manner of ways, "aut per defectum sanguinis," *i. e.* for default of heir, "aut per delictum tenentis," *i. e.* for felony, and that is by judgment three manner of ways, "aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est." And therefore they which are hanged by martial law "in furore belli" forfeit no lands; and so in like cases escheats by the civilians are called "caduca."

The father is seised of lands in fee holden of I. S., the son is attainted of high treason, the father dieth, the land shall escheat to I. S., *propter defectum sanguinis*, for that the father died without

heir. And the king cannot have the land, because the son never had anything to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

Co. Lit. 13 b. And it is to be well observed that our author saith, *if he hath no heir, &c., the land shall escheat.* In which words is implied a diversity (as to the escheat) between fee simple absolute, which a natural body hath, and fee simple absolute, which a body politic or incorporate hath. For if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have again this land, and not the lord by escheat.[1] And so if land be given in fee simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politic or incorporate is dissolved, the donor shall have again the land, and not the lord by escheat. And the reason and the cause of this diversity is, for that in the case of a body politic or incorporate the fee simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politic or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath been said) no writ of escheat lieth but in the three cases aforesaid, and not where a body politic or incorporate is dissolved.

3 Inst. 21. If a man seised in fee of a fair, market, common, rent-charge, rent-seek, warren, corody, or any other inheritance, that is not holden, and is attainted of felony, the king shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, nor can they escheat because they be not holden, they perish and are extinct by act in law: for in escheats for petit treason or felony, a tenure is requisite, as well in the case of the king, as of the subject.[2]

[1] "*Vid. tamen Mich.* 20 *Jac. C. B. Johnson and Morris, that it shall escheat.* Hal. MSS. which also cites 21 E. 4, 1, and 21 H. 7, 9. See further on this subject, Godb. 211, and Mo. 283, which are with Lord Coke. But the case of *Johnsŏn and Norway*, in Win. 37, which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch that the judges *finally* decided the point. See also *contra* Lord Coke, the case of *Southwell and Wade*, in 1 Ro. Abr. 816 A, pl. 1, and s. c. in Poph. 91. — Hargrave's note *ad. loc.* See Gray, Rule Against Perpetuities (2d. ed.), §§ 44–51 a." — 4 Gray Cas. on Prop, (2d. ed.), p. 2 note.

[2] "Escheat therefore being a title frequently vested in the lord by inheritance, as being the first of a seigniory to which he was entitled by descent (for which reason the lands escheated shall attend the seigniory, and be inheritable by such only of his heirs as are capable of inheriting the other), it may seem in such cases to fall more

properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his own act or agreement), than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat:* on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title: and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the seigniory to which they belong, they may vest by either purchase or descent, according as the seigniory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caduceary succession." — 2 Bl. Com. 244.

"Great care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord; which by reason of their similitude in some circumstances, and because the Crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seigniory or lordship paramount: but, being a prerogative vested in the Crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

"The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason." — *Id.* 251.

On the disposition of personal property where the owner dies without next of kin, see *Commonwealth* v. *Blanton*, 2 B. Mon. 393; *Johnston* v. *Spicer*, 107 N. Y. 185.

On attainder and civil death, see *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389; *Estate of Donnelly*, 125 Cal. 417; *Avery* v. *Everett*, 110 N. Y. 317; *Baltimore* v. *Chester*, 53 Vt. 315.

On the rights of the Crown to equitable interests in real and personal property when *cestui que trust* dies without heirs or next of kin, see cases collected in Ames, Cases on Trusts (2d ed.), pp. 351 *et seq.;* F. W. Hardman's article in 4 Law Quart. Rev. 318. See Stat. 33 and 34 Vict. c. 23, § 1 (1870); Stimson, Am. Stat. Law, § 143.

CHAPTER II.

DESCENT.

SECTION I.

IN GENERAL.

STAT. 20 HEN. III., c. 9 (1236) — To the King's Writ of Bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer to it; because it was directly against the common order of the Church. (2) And all the bishops instanted the Lords, that they would consent, that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved.

LIT. § 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

LIT. § 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may [lineally][1] descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent, and not by lineal ascent.

LIT. § 4. And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side: but, if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother. But if a man

[1] Throughout the extracts from Littleton brackets in the text indicate that according to the best French Texts the words enclosed are spurious. Littleton's Tenures (Wambaugh's ed.), p. 2, note 1.

marrieth an inheritrix of lands in fee simple, who hath issue a son, and die and the son enter into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs of the part of the father. And, if he hath no heir on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. [In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heir on the part of the mother. And if there be no heir of the part of the father, the lord of whom the land is holden shall have the land by escheat.] And so see the diversity, where the son purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

LIT. § 5. Also if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

LIT. § 6. Also it is to be understood, that none shall have land of fee simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin shall have the same because the younger brother is but of half blood to the elder.

LIT. § 7. And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heir [to her brother], and not the younger brother, for that the sister is of the whole blood of her elder brother.

LIT. § 8. And also, where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue [and his uncle enter as next heir to him, who also dies without issue], now the

younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

Co. Lit. 13 a. If a man giveth lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are void, as in the case that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heirs males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.[1]

Co. Lit. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed, "quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfata Robergia per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'." And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

Co. Lit. 11 b. So it is if a man hath issue a son and a daughter, the son purchaseth land in fee and dieth without issue, the daughter shall inherit the land; but if the father hath afterward issue a son, this son shall enter into the land as heir to his brother, and if he hath issue a daughter and no son, she shall be coparcener with her sister.[2]

[1] In *Johnson* v. *Whiton*, 159 Mass. 424, land was devised to A. "and her heirs on her father's side." The court *held*, that A. could convey an unqualified fee.

[2] See *Goodale* v. *Gawthorne*, 2 Sm. & G. 375; *Richards* v. *Richards*, H. R. V. Johns. 754; *In re Mowlem*, L. R. 18 Eq. 9; *Bates* v. *Brown*, 5 Wall. 710.

CANONS OF DESCENT.[1]

1. INHERITANCES shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.[2]

2. The male issue shall be admitted before the female.

3. Where there are two or more males, in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living.

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.[3]

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.[4]

7. In collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.[5]

[1] These canons are taken from Blackstone. On the Law of Descent, see 2 Bl. Com. c. 14, pp. 201–240.

[2] See *Jackson* d. *Austin* v. *Howe*, 14 Johns. 405.

[3] "The method of computing these degrees in the canon law, which our law has adopted, is as follows: We begin at the common ancestor and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father to each of them is counted only one; Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of Titius." — 2 Bl. Com. 206.

[4] "In agnation too is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother but not by the same father; and, limited in this way, it is a strict deduction from the system of agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clew to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consanguineous* brothers, that is to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood." — Maine, Anc. Law (4th ed.), 151.

[5] See *Clere* v. *Brook*, Plowd. 442, 450, 451; 2 Bl. Com. 238, 240.

The English Law of descent was changed by Stat. 3 and 4 W. IV c. 106 (1833).

SECTION II.

STATUTES.

Illinois.

ANNOT. STATS. (1913), Par. 4202 (c. 39, Sec. 1). Be it enacted . . . . that estates, both real and personal, of residents and non-resident proprietors in this state dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in manner following, to wit:

First, To his or her children and their descendants, in equal parts; the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them.

Second, When there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants.

Third, When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children or descendants of a child or children.

Fourth, When there is a widow or a surviving husband, and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one-third of all the personal estate of the intestate.

Fifth, If there is no child of the intestate or descendant of such child, and no parent, brother or sister or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree (computing by the rules of the civil law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood.

Sixth, If any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband.

Seventh, If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to and vest in the county in which said real or personal estate, or the greater portion thereof is situated.

Par. 4203 (Sec. 2). An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living.

Second, The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases.

Third, In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband.

Fourth, When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants — one-half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor.

Fifth, In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law.

Sixth, When there are no heirs or kindred, the estate of such person shall escheat to the State, and not otherwise.

Par. 4204 (Sec. 3). An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.[1]

Par. 4210 (Sec. 9). A posthumous child of an intestate shall receive its just proportion of its ancestor's estate, in all respects, as if he had been born in the life-time of the father.[2]

Massachusetts.

REV. LAWS (1902), c. 133, Sec. 1. When a person dies seised of land, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts and to the rights of the husband or wife and minor children

[1] Par. 4205–4209 deal with the effect of advancements to children or descendants.

[2] Every householder with a family is entitled to a homestead exemption which, under certain conditions, is not subject to the laws of descent. Illinois, Annot. Stats. (1913), §§ 5571, 5572. The widow and children of the deceased are allowed an allowance for their reasonable support for one year after his death. Annot. Stats. (1913), §§ 123–126. As to dower, see Annot. Stats. (1913), c. 41.

of the deceased as provided in the two preceding chapters [1] and in chapter one hundred and forty, in manner following:

First, In equal shares to his children and to the issue of any deceased child by right of representation; and, if there is no surviving child of the intestate, then to all his other lineal descendants. If all such descendants are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation.

Second, If he leaves no issue, then in equal shares to his father and mother.

Third, If he leaves no issue nor mother, then to his father.

Fourth, If he leaves no issue nor father, then to his mother.

Fifth, If he leaves no issue and no father or mother, then to his brothers and sisters and to the issue of any deceased brother or sister by right of representation; and, if there is no surviving brother or sister of the intestate, then to all the issue of his deceased brothers and sisters. If all such issue are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation.

Sixth, If he leaves no issue, and no father, mother, brother or sister, and no issue of any deceased brother or sister, then to his next of kin in equal degree; but if there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor who is more remote.

Seventh, If an intestate leaves no kindred and no widow or husband, his or her estate shall escheat to the commonwealth.

Sec. 2. The degrees of kindred shall be computed according to the rules of the civil law; and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

Sec. 3. An illegitimate child shall be heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which such person would have taken if living.

Sec. 4. If an illegitimate child dies intestate and without issue who may lawfully inherit his estate, such estate shall descend to his mother or, if she is not living, to the persons who would have been entitled thereto by inheritance through his mother if he had been a legitimate child.

Sec. 5. An illegitimate child whose parents have intermarried,

[1] A householder with a family is entitled to a homestead exemption which under certain conditions is not subject to the laws of descent. Rev. Laws (1902), c. 131, Secs. 1, 8.

Curtesy and dower, in a modified form, are preserved, if claimed within a year after the approval of the bond of the executor or administrator in lieu of the provision in Rev. Laws (1902), c. 140, Sec. 3. Rev. Laws (1902), c. 132, Sec. 1; Acts (1915), c. 134, Sec. 1.

and whose father has acknowledged him as his child, shall be considered legitimate.

Sec. 6. Inheritance or succession by right of representation is the taking by the descendants of a deceased heir of the same share or right in the estate of another person as their parent would have taken if living. Posthumous children shall be considered as living at the death of their parent.

Rev. Laws (1902), c. 140, Sec. 1. . . . The widow may remain in the house of her husband for not more than six months next succeeding his death without being chargeable for rent.[1]

Sec. 3. If a person dies possessed of property not lawfully disposed of by will, it shall be distributed as follows:

First, The personal property remaining after said allowances shall be applied to the payment of the debts of the deceased and the charges of his last sickness and funeral and of the settlement of his estate.

Second, The residue of the personal property shall be distributed among the persons and in the proportions prescribed for the descent of real property in chapter one hundred and thirty-three, except as otherwise provided herein.

Third, If the deceased leaves no issue, the surviving husband or widow shall take five thousand dollars and one-half of the remaining personal property and one-half of the remaining real property. If the personal property is insufficient to pay said five thousand dollars, the deficiency shall, upon the petition of any party in interest, be paid from the sale or mortgage, in the manner provided for the payment of debts or legacies, of any interest of the deceased in real property which he could have conveyed at the time of his death.

If the deceased leaves issue, a surviving husband or widow shall take one-third of the remaining personal property and one-third of the remaining real property.

If the deceased leaves no kindred, a surviving husband or widow shall take the whole of the remaining real and personal property.

If the deceased leaves no husband, widow or kindred, the whole of the remaining personal property shall escheat to the commonwealth.

New York.

Consol. Laws (1909), Real Property Law, Art. 4, Sec. 204. A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to pay any rent for the same; and in the meantime she

[1] Sec. 2 authorizes the probate court to grant to the immediate family of the deceased an allowance for necessaries for six months. In default of personalty the realty may be sold to provide therefor.

may have her reasonable sustenance out of the estate of her husband.[1]

CONSOL. LAWS (1909), Decedent Estate Law, Art. 3. Sec. 81. The real property of a person who dies without devising the same shall descend: 1. To his lineal descendants. 2. To his father. 3. To his mother; and 4. To his collateral relatives, as prescribed in the following sections of this article.

Sec. 82. If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

Sec. 83. If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

Sec. 84. If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

Sec. 85. If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

Sec. 86. If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

[1] A householder having a family or a married woman owning a residence is entitled to a homestead exemption, which under certain conditions is not subject to the laws of descent. Code Civ. Proc. (1913), §§ 1397–1400.

SEC. 87. If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

SEC. 88. If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

Sec. 89. If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.[1]

Sec. 90. Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Sec. 91. When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

Sec. 92. In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

Sec. 93. A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

Sec. 94. When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

Sec. 95. A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.[2]

[1] An illegitimate child becomes legitimatized by the subsequent marriage of its parents. New York, Consol. Laws (1909), Domestic Relations Law, Art. 3, Sec. 24.

[2] Alien friends may inherit in the same manner as native born citizen. New York, Laws (1913), c. 152.

Sec. 96, 97 deal with the effect of advancements to children, *post*, p. 777.

A widow is "endowed of the third part of all the lands whereof her husband was siezed of an estate of inheritance, at any time during the marriage." New York, Consol. Laws (1909), Real Property Law, Art. 6.

For other American Statutes of Descent, see Stimson, Am. Stat. Law, §§ 3100-3155, and 4 Kent, Com. 373–422.

SECTION III.

BREAKING DESCENT.

DUDROW AND KING, AN INFANT *v.* KING.

117 Md. 182. 1912.

PEARCE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court of Frederick County, ratifying an auditor's account distributing the sum of $1,054.10, part of the proceeds of sale of the real estate of Edmund Dorsey King of Frederick County, deceased, and the sole question presented is whether the distribution shall be to the next of kin of the whole blood alone or to the next of kin of *both* the whole and half blood.

Singleton King died intestate in 1897 seized of a farm in Frederick county, Maryland, containing 155 acres, and leaving a widow, Caroline King and eight children, his only heirs at law. Four of these children, Singleton L. King, James Harrison King, Mary Jane Browning and William King were by the first wife of the deceased, and four, viz., Mrs. Manzella Bell, J. Beall King, E. Dorsey King and Caroline C. Harris, were by the second wife. His widow, Caroline King, was his third wife and had no children. The real estate in question, therefore, descended upon the death of Singleton King, to the above named eight children, subject to the dower of the widow, Caroline King.

Edmund Dorsey King became the administrator of his father, and entered into an agreement with his brothers and sisters, and with Caroline King to purchase all their interest in said real estate for the sum of $6,986.25, but being advised, erroneously, that he could not purchase directly from them, because he was the administrator of their father, he united with them in conveying said real estate, by deed dated January 8th, 1898, to Wm. P. N. Lawson, with the understanding among all said parties that said Lawson should immediately convey the same to said Edmund Dorsey King by a deed *then prepared*, and intended to be of even date with the deed to said Lawson. This deed to Lawson was not acknowledged by all the grantors until January 27th, 1898, as they resided in different places, but when it was acknowledged by all, Lawson, by deed dated February 2nd, 1898, conveyed the property to Edmund Dorsey King, it being described in the deed to Lawson as the same which descended from Singleton King to his eight above named children, subject to the dower of Caroline King; and being described in the deed from Lawson as the same described in "a deed from Caroline King and others *of even date herewith*, and intended

to be recorded herewith, to the said Wm. P. N. Lawson." The same consideration was expressed in both deeds, viz., $6,986.25, but Lawson did not pay the same nor any sum whatever to any of the grantors in the deed to him, nor did he receive, nor was he intended to receive any beneficial interest whatever in said real estate; but he accepted said conveyance to him, in trust to convey the property to said Edmund Dorsey King, in the manner and for the purpose for which he did convey it, and Edmund Dorsey King concurrently with the delivery of both said deeds paid the entire purchase money to his stepmother and his brothers and sisters.

Edmund Dorsey King died intestate in 1910 leaving surviving him no child or descendant, no father or mother, brother or sister, but leaving two nieces, Mabel S. King, a child of his deceased brother, J. Beall King, and Birdie J. Dudrow, a child of his deceased sister Manzella Bell, as the only descendants of his brothers and sisters of the whole blood; and leaving also a number of nieces and nephews, descendants of his brothers and sisters of the half blood all of whom are named in the proceedings.

The real estate in question was sold under a decree of Court by the trustee appointed for that purpose, for $15,530, and the sale being reported, the purchaser filed exceptions thereto, because of the claim of the nieces and nephews of the half blood to an interest in said real estate, they not having been made parties to the proceedings. They were thereupon made parties by order of Court, upon petition of the purchaser, and all appeared and answered said petition, setting up their claim in their answers, and the two nieces of the whole blood demurred to said answers.

The sale was ratified and an auditor's account was stated distributing the net proceeds equally between the two nieces of the whole blood, upon the theory that Edmund Dorsey King took title to the whole tract by purchase. Exceptions were filed to this account by the nieces and nephews of the half blood, which exceptions were sustained, and the said auditor's account was rejected, and the auditor was directed to state another account distributing seven-eighths of the net proceeds to the two nieces of the whole blood, and one-eighth to the nieces and nephews of the whole and half blood. Upon this basis, the sum of $1,045.10, is distributed to the nieces and nephews of the half blood, and to that distribution the two nieces of the whole blood except, and their exceptions being overruled, and the auditor's account being ratified, they have appealed.

Sections 3 and 4 of Article 46 of the Code provide that where the estate descended to the intestate on the part of the father, if there be no child, or descendant, or father, living, it shall descend to the brothers and sisters of the intestate of the blood of the father and their descendants equally.

Section 19 of Article 46 provides that if the estate shall be vested

in the intestate by purchase, or shall descend to or vest in him in any other manner than by descent on the part of the father or mother, and there be no child or descendant of the intestate, then the estate shall descend to the brothers and sisters of the intestate of the whole blood and their descendants in equal degree, equally.

Section 26 provides that there shall be no distinction between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father.

Upon the death of his father intestate, Edmund Dorsey King took one-eighth of the land in question by descent from him, and the only question for us, is whether the effect of the two conveyances above mentioned, broke this descent and changed his title to that one-eighth, from a title by descent to one by purchase. The learned judges of the Circuit Court held that no change of title was effected and we are of opinion their decision was correct.

It is quite clear from the admitted facts in the case that there was no actual intention on the part of Edmund Dorsey King, by adopting the course of conveyancing used, to effect any change in the title which he took from his father to that one-eighth of the estate, and that no change could have been effected, if he had taken a conveyance, as he contemplated, from his brothers and sisters of their seven-eighths of the estate. The question could not have arisen but for the erroneous advice given him that he could not acquire any title by direct purchase from them.

It may be observed here that the demurrer of the appellants to the answer of the appellees admits the averments of the eighth and ninth paragraphs of the answer, that "it was understood between Edmund Dorsey King and his brothers and sisters that he should not dispose of said farm," and "that on his death it would descend by inheritance to all of his said brothers and sisters, if living, and if not, then to their descendants *per stirpes;* * * * as they did not know there was any difference in law as to the right of inheritance between the children of the first wife and those of the second wife." * * * "and that they would not have agreed to sell him their interests in said farm at the valuation of $45 per acre, being $20 less per acre than the land was worth, if it had not been for their understanding that he was not to dispose of said farm, and that it would come back to them or their descendants on his death." This consideration could not, of course, defeat an intention to break the course of descent by an apt conveyance, nor could it control the operation of a conveyance, *the clear legal effect* of which was to break the descent although not so intended, but it is an element of this case not to be disregarded in the light of all the cases upon the subject.

The general rule is that if one who is in by descent convey his interest away, and it be conveyed back to him he holds thereafter by purchase and not by descent. The rule is stated thus in *Coke*

upon Littleton, Vol. 1, 12 b.: "If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite." The authorities, ancient and modern agree that this is the general rule. But, in a note by Mr. Hargrave to the above text of Coke, it is said: "But here Lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase." It is upon the doctrine of this note of Mr. Hargrave that the Court below was satisfied to rest its decision. That doctrine however, is supported by lawwriters of high authority and by cases illustrating its application.

In *Greenleafs Cruise on Real Property*, Vol. 2, Title Descent, p. 338, and p. 341, states the law in almost the exact words of Mr. Hargrave's note to which he refers on page 338, and on page 341 cites *Godbold* v. *Freestone*, 3 Lev. 406, in support of the rule. He states that case as follows: "A person seised of lands by descent *ex parte materna* made a feoffment of them to uses; to the use of himself for life, remainder to his wife for life; remainder to the heirs of his body on his wife begotten, remainder to his own right heirs. * * * Adjudged that upon the death of the husband without issue the remainder descended to the heirs of the feoffer *ex parte materna, because the ancient fee remained in him.*" And he adds, on page 341, "Where a fine was levied or a common recovery suffered, if the use was not altered, the mode of descent was not changed." In a more modern work, *Broom and Hadleys Commentaries*, top page 660, the same doctrine is stated thus. "If one seized *ex parte materna*, made a feoffment in fee so as to part with the estate *absolutely* and then took a reconveyance the descent was broken, but if he made a conveyance for the purpose of creating particular estates and limited the ultimate fee to himself, this was held to be the same estate he had before, and it descended to the heir *ex parte materna*. The estate which is taken back must be in reality *a new estate*, and not merely a part of the old estate, unless it comes within the *Statute of 3rd & 4th William*, 4 Ch. 106, sec. 1, enacted in 1833," which changed the rule previously stated, but which is, of course, not in force in Maryland.

The great case of *Cave* v. *Holford*, 3 Vesey, 650, is the most interesting discussion of the principles here involved which we have examined. In that case, the opinions of Justices Rooke, Heath

and Buller given in the Court of Common Pleas, controlled the decision, while Chief Justice Eyre dissented, and the opinions of each of these justices are reported in full, the editor of the reports referring to it as a case involving deep research of authority. The judgment of the Court of Common Pleas was affirmed by the high Court of Chancery, but that decision having been rendered in 1798, is not binding upon us as authority, and we are free to consider it with that deference which is due to all the cases of the higher Courts of England.

In this spirit we have examined that case, and in our judgment the conclusion of Chief Justice Eyre rests upon principles more in accord with justice, and with an enlightened view of the application of legal principles, and more in consonance with the views of the courts of this country upon this question. The form in which the question was there presented, was whether the conveyance by a testator, of property devised by his will, was a revocation of the will as to that property, upon the ground that after acquired property could not pass by the will. The conveyances which were there held to operate as a revocation of the will were of lease and release, and Chief Justice Eyre said: "Let the operation of this conveyance be what it may, the testator died seised of that estate which he had at the time he executed the will; * * * and that I may be clearly understood, when I say the same estate, I do not mean the identity of the land, but the quality of estate and interest in that land. I mean to argue that he died seised of the old use; to which the new estate, right, title, and possession (to use the words of the statute) that was for a moment in the trustees, under the conveyance, had united itself, not as a new estate, right, title and possession, but according to the quality, manner, form and condition of that old use, for those are the words of the statute. Here I take my ground * * *. The intent of the parties in this deed and the whole substantial effect (be its formal operation what it may) was simply to secure a jointure of £1400; and the estate, subject to that, was not intended to be altered or in any manner affected; and as far as the form of the conveyance purports to alter the nature and quality of the estate, it goes beyond the object of the conveyance. Courts of justice not only do not incline to allow the form of the conveyance to go beyond the intention, but will be ready to adopt all expedients to prevent it and to confine the operation of every conveyance to the special purpose," citing for this purpose Lord Hardwicke in *Parsons* v. *Freeman*, 3 Atkyns Report, 741. Referring to *Tichner* v. *Tichner*, the Chief Justice said: "They, the judges, wisely determined the purpose of conveyance was everything, the form nothing; * * * and upon that authority, supported by that of Lord Hardwicke in *Parsons* v. *Freeman*, I am of opinion that the authorities will be better supported by declaring that this conveyance is not a revocation, than by the contrary determination."

It is significant, moreover, that in the opinion of Mr. Justice Rooke he observes "you must distinguish between an intention to have the land as a new purchase, and an intention to revoke the will," thus intimating a distinction between the case of a mere conveyance and reconveyance to accomplish some collateral purpose, and a case involving *also* the question of the revocation of a will as to the special property under consideration, as a result of a conveyance and reconveyance after the execution of the will. And in the opinion of Mr. Justice Buller in the same case, he refers to *Godboldt* v. *Freeman*, 3 Levinz, 406, and *Abbott* v. *Burton*, 2 Salk, 590, in both of which the estate taken back was held to be of the old use and therefore to go to the heir *ex parte materna* and he says "*in these last two cases* there was no question about a revocation." The principles thus announced are not without support by analogy in our own decisions. In *Lynn* v. *Gephart*, 27 Md. 563, where the question before the Court was as to changing the *quality* of property from real to personal by a deed of trust, our predecessors said, "The inclination of Courts of equity upon this branch of jurisprudence, is not generally to change the quality of property unless there is some clear intention or act by which a definite character either as money or land has been unequivocally fixed upon it throughout."

The views expressed by Chief Justice Eyre above are in exact accord with the language of Judge Robinson in *Rawlings* v. *Lowndes*, 34 Md. 643, where he said: "At common law the widow was entitled to dower in the lands and tenements by which the husband was seised as of an estate of inheritance during the coverture. If however, the *seisin* was merely *instantaneous, intended as a means of accomplishing some ulterior purpose in regard to the estate*, the husband being as it were, a *conduit*, through which the estate passed, without any intention to clothe him with a *beneficial* interest, the widow would not be entitled to dower, as for instance a conveyance to a trustee to reconvey, or as put in the old books, a levy by way of a fine, the conusee rendering back by the same fine, the lands and tenements to the conusor. The husband in such cases holds the *bare legal title* without any *beneficial interest*. 2 *Crabbs Real Prop.* 81; *Washburns Real Prop.* 176; *Coke Litt.* 31, b" and in *Glenn* v. *Clark*, 53 Md. 606, this is said to be "the established law in Maryland."

The cases of *Freeman* v. *Allen*, 17 Ohio State, 527, and *Carter* v. *Day*, 59 Ohio St. 96, both cases for partition of land of which the ancestor died seised, support the conclusion reached in this case by the Circuit Court, and the case of *Helfinger* v. *Wolf*, 11 Ohio Dec. (Reprint) 906, which is not a case for partition will be found especially instructive. That case is fully and clearly reasoned, and the conclusion reached by the Court is thus expressed. "Where one owning both the legal and equitable estates by descent, parts by her own act momentarily with the mere technical legal title, retain-

ing the entire beneficial interest which standing alone would have descended as ancestral, thus creating a mere dry trust, which is held to her unqualified use, the immediate reacquirement of the naked title does not break the descent and constitute her a new source of title, for she conveyed the title for her own use."

This case has been argued for the appellants with great zeal and very ably, and their argument is sustained by the decision in *Holme* v. *Shinn*, 62 N. J. Eq. 1, in an elaborate opinion by the Chancellor, and also by the case of *Nesbitt* v. *Trindle*, 64 Ind. 185, but we are not able to adopt the views there held for the reasons already stated.

Order affirmed, with costs to the appellees above and below.[1]

BEAR'S CASE.

1 Leon. 112. 1588.

A FORMEDON in the descender was brought by Samuel Bear, James Bear, and John Bear of lands in gavelkind; and the warranty of their ancestor was pleaded against them in bar, upon which they were at issue, if assets by descent. And it was found by special verdict, that Thomas, father of the demandants, was seised in fee of the lands supposed to be descended to the demandants, being of the nature of gavelkind, and devised the same to the demandants, being his heirs, by the custom, and to their heirs equally to be divided amongst them: And if the demandants shall be accounted to be in of the lands by descent, or devise, was the question; for if by devise, then they shall not be assets. *Anderson*, Let us consider the devise by itself without the words (equally to be divided amongst them). And I conceive that they shall be in by the devise, for they are now joint-tenants, and the survivor shall have the whole, whereas if the lands shall be holden in law to have descended, they should be parceners, and so as it were tenants in common. And although the words subsequent, equally amongst them to be divided, makes them tenants in common, yet that doth not amend the matter; and so also was the opinion of WINDHAM and RHODES, Justices.[2]

[1] The authorities are collected in 39 L. R. A. N. S. 955.

On the descent of the equitable fee when land is settled in trust for the settlor and his heirs, see Ames, Cas. on Trusts (2d ed.), pp. 351 *et seq.* Compare Davis v. *Kirk*, 2 K. & J. 391, *post*, p. 23.

When the legal estate descends from one parent and the equitable from the other, the land descends according to the legal estate. "There is no equity between the different classes of heirs." — *Per* LEACH, V. C., in *Langley* v. *Sneyd*, 1 S. & St. 45, 55. And see *Goodright* v. *Wells*, 2 Doug. 771; *In re* Douglas, 28 Ch. D. 327.

[2] See *Campbell* v. *Herron*, Cam. & N. 291; *Gilpin* v. *Hollingsworth*, 3 Md. 190.

BIEDERMAN *v.* SEYMOUR.

3 Beav. 368. 1840.

THE MASTER OF THE ROLLS. [LORD LANGDALE.][1] In this case the question reserved was, whether the real estate which the testator devised to his heir at law, is to be taken as real assets, for payment of debts, in priority to real estates, by the same will devised to other persons.

The devise to the heir is made subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1,000 to her two children.

Notwithstanding the devise, and notwithstanding the charges, the heir takes by descent. *Chaplin* v. *Leroux*, 5 M. & S. 14. For the purpose of making him take otherwise than by descent, the devise is said to be void; and it is argued for the defendants that the devise is void for all purposes: that no intention can be applied to it: that the attempted devise must be treated as a mere nullity, and the estate therein comprised be considered merely as descended estates, and therefore as assets to be applied for the payment of debts, in priority to estates effectually devised.

But whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise; whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed; or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts; or simply, as Mr. Justice Bayley said in *Chaplin* v. *Leroux*, because it is convenient that the property should be assets in the hands of the heir; there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires.

It cannot be said of estates expressed to be devised to the heir, as of estates not mentioned in the will, that they are "quite out of the scope of the testator's intention, perfectly beside and independent of it," 2 Bro. C. C. 262; it is indeed clear that an estate which the testator says he devised to the heir, is within the testator's intention, and meant to be a benefit to the heir. There is nothing illegal in that intention, and if the rule be founded on the regard due to third persons, as creditors or otherwise, there seems no reason for its application between the heir and other objects of the testator's bounty; and if the effect of the devise be to procure for the heir a contribution from the other devised estates towards payment of debts, which would otherwise have had to be borne by descended estates alone, it cannot be said that the heir obtains by gift something which was his own, without gift.

[1] The opinion only is given.

Courts of justice ought to carry into effect the intentions of testators as far as they can consistently with the rules of law; and in this case, although the rule of law makes the devised estates assets in the hands of the heir, and the creditors may, therefore, resort to this estate in priority to others, and without being embarrassed with the necessity of seeking contribution from other devisees; yet, as it appears by the expressions which the testator has used, to have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees, there seems to be no reason why, without prejudice to the claims of creditors or others, the heir should not enjoy the like benefit which is given to other devisees; or why those who claim under the will, and do not appear to be more objects of the testator's bounty, should be permitted to defeat the expressed intention in favor of the heir.

I do not think that the testator's intention can be excluded from the consideration of this question. The intention is not to prevail against the rule of law for the benefit of third persons. A testator cannot, as against creditors, exempt his personal estate from payment of his debts, or prevent his real estates from being assets, by devising them to his heir; but we may collect from his will an intention, that, as amongst those claiming under the will, the personal estate, or any portion of the real estate, shall be exonerated; and if there be an equal intention to give to devisees named, and the gift must be encroached upon by the liability of the subjects of them to pay debts, I think the doctrine that the heir, who is devisee, shall take by descent, does not afford a sufficient reason for saying, that the burden of the debts should not be borne ratably by the devisees, although one of them is heir; and I am of opinion that although the creditors have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet that the heir will be entitled to contribution from the other devisees to the extent in which his estate may be exhausted by debts.[1]

DAVIS *v.* KIRK.

2 K & J. 391. 1855.

William Harding, by his will, dated in 1845, gave and devised all his freehold and copyhold estates to Anthony Davis, his heirs and assigns, to hold the same unto and to the use of the said Anthony Davis, his heirs and assigns, upon trust to sell all those three closes therein specifically described, and to stand possessed of the moneys to arise from such sale, upon trust to pay all the said testator's debts, funeral and testamentary expenses; and in the next place to pay the residue thereof to the said testator's wife, Ann Harding;

[1] *Ellis* v. *Page*, 7 Cush. 161, *contra*. Compare *Randall* v. *Marble*, 69 Me. 310.

and as to all the rest, residue, and remainder of the said testator's real estate thereinbefore given and devised to his said trustee, upon trust to pay the rents and profits thereof unto the said Ann Harding for her life; and, after her decease, upon trust to convey the said residue of his the said testator's real estate unto such person as should answer the description of his heir-at-law; and the said testator appointed the said Anthony Davis executor of his said will.

The testator died shortly after the date of his will, and the said Ann Harding, his widow, died in 1853.

At the time of his death, the testator William Harding was seised in fee of copyhold lands besides those mentioned in the will, which had descended to him *ex parte materna*, and these were now claimed by his heir-at-law, and also adversely by his heir *ex parte materna*.

Vice-Chancellor Sir W. Page Wood, without hearing the counsel for the defendants, gave judgment as follows: —

I do not think that there is any doubt about this case. I have been looking at the case of *Harris* v. *The Bishop of Lincoln*, 2 P. Wms. 135. The report of it is in the shape of an argument between the bar and the court, counsel making an observation and the court answering it. I find there "it was objected, that, if the will should be construed in such manner as to entitle the heir of the mother's mother to the estate, such will would be void and nugatory, and the testator all this while would be doing of nothing, because, without any will, the premises would go to the heir of the mother's mother, who was the heir-at-law to this estate, the heir of the mother's father having none of the blood of the first purchaser. To which the court said, that the testator giving by his will several annuities and charities, and then saying that the residue of the profits should go to the right heirs of the mother's side, it was the same thing as if he had said, 'so far I dispose of my estate, and let so much of it go from my heir who otherwise would have had it, but I will not dispose of it any further from the heirs at law of the mother's side, whence it came, and where it would go in case I should not give it away.'" In other words, the court treated it as not being a devise at all, but considered that the heir took by his better title; and that was the principle of the decision.

I think that the answer to the case of *Godbold* v. *Freestone*, 3 Lev. 406, which is the only case that touches this, is, that the use is the old use. Here the devise is an express devise, which vested the whole fee simple in the trustees, and gave it away from the heir. The whole estate is devised away from the heir, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator's heir-at-law. The expression "heir-at-law" is somewhat strong; but, independently of that, the fact of the testator having devested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to the trustees, and leaving them to find out

the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir-at-law of the testator. I think that there is not any authority precisely in point; but the principle must be, that, when once the descent is broken by a devise of the whole fee simple to trustees, upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law.[1]

[1] See *Burr* v. *Sim*, 1 Whart. 252. The authorities on breaking descent by devise are collected in 13 Prob. Rep. Ann. 412.

"Upon recollecting the case on Mrs. F.'s will, lately laid before me by Mr. W., it now strikes me that the opinion I delivered upon it is, in one part, not well founded; and, though I have not the case, nor a copy of it, by me, my memory supplies me with all that is necessary to enable me to make what, I think, the requisite correction.

"The devise by Mrs. F. to her two sons, if I remember right, was under a power in her marriage-settlement. Now, regularly, whoever takes under an *execution of a power* contained in any *conveyance or settlement*, takes under such *conveyance or settlement itself;* and, if this rule extended to the present case, both the sons must have taken as under the settlement, and consequently by *purchase;* in which case, their heirs, *ex parte paterna*, would have been clearly entitled to *the whole*. But the rule, it seems, does not hold in a devise, under such a power, to the *heir-at-law* of the party executing it, where such *heir* would have taken the *same estate by descent* from *that person* in default of execution of the power. Vide *Hurst* v. *The Earl of Winchelsea*, 1 Black. Rep. 187. For there, according to the common rule in respect to devises to an heir-at-law, such heir shall be in by descent, and not by purchase.

"This consideration only affects the *moiety* of the eldest son; for, as to that devised to the youngest, he could not take it otherwise than by *purchase*, as he was not *heir* of the testatrix; and, as he took by purchase, his share of course descended, either *immediately* from himself, or *mediately* through his brother (if his brother survived him), to his heir *ex parte paterna:* And, therefore, I think it clear, that the heir of the son, on the part of Mr. F. *their father*, is entitled to this moiety. But, as to the other moiety devised to the eldest son, it remains to be inquired, How the lands were limited by the settlement, in default of appointment by Mrs. F.? which, I believe, did not appear by the case stated. If they were not limited to her *in fee*, so that her eldest son would not have taken if there had been no will, then, I conceive, he took as under the settlement, by virtue of the execution of the power contained therein; for he could not, in that case, take by descent; and then, as he took by *purchase*, his moiety also descended to his heir *ex parte paterna;* and then the title to the *whole* will stand as supposed in my former opinion. But if the lands were, by *the settlement*, limited to Mrs. F. *in fee*, in default of appointment, so that her eldest son *would have taken as heir*, if she had not executed her power, then, I conceive, under the authority of the case above cited, he took by *descent*, and not by the will; unless a devise to an *heir-at-law, and another* as *tenants in common*, prevents the *descent* as to the moiety devised to such heir, and makes him take by purchase under the will.

"Now, I believe, in my former opinion, I supposed this circumstance of the *tenancy in common* to be an obstacle to his taking *by descent*, and that, to do so, he must have *taken solely as his mother held it*. But this latter proposition is certainly wrong; for, suppose a testator devises a moiety, or any other undivided share, of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining share will of course descend to his heir-at-law, and he must hold it *in common* with the devisee of the undivided share devised. It is clear, therefore, that an heir may take by *descent*, as *tenant in common* with a devisee, an undivided part of

the estate which his ancestor *was solely seised of;* and it appears to me to be immaterial, whether the share he so takes is *expressly devised to him*, or left unnoticed, by the *will;* for, if expressly devised, he takes it in *common*, and, if not noticed, he takes it in *the same manner;* and a devise to two or more as *tenants in common*, is in effect a devise of one undivided part *to one*, and *of another undivided part to the other;* so that under such a devise to an heir and another as *tenants in common*, the heir takes as if *one undivided moiety* were devised to *the other*, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case he would have taken by descent; and therefore, the same estate being devised to him in such residue as he would have taken by descent, I think, the general rule, respecting devises to an heir, extends to it.

"It has indeed been held, that a devise to the *heir and another* makes the heir a purchaser; but that seems to be on account of the *joint tenancy* and benefit of *survivorship* to the stranger. And it appears, that under a devise to *two co-heirs*, they take as joint-tenants by the will, and not by *descent;* and so in a devise to them *in common*, they take *as tenants in common*, and not by *descent*. But, it is evident, under either of these tenures, they take *every part* of the land devised in a different manner than by *descent;* whereas, in the case of a devise to the heir *and another*, as *tenants in common*, the heir seems to take the *part devised to him*, just in the same manner as if it had been left *to descend* to him. I therefore, upon this consideration of the point, am of opinion, that the devise being to the two sons, as *tenants in common*, was no obstacle to the eldest taking his *moiety* by *descent;* and consequently, that if the lands were settled on his mother *in fee*, so as to descend from her to him, in default of appointment, he took his moiety by *descent*, and not by the will or settlement; and, in that case, his heir *ex parte materna* will be entitled to his said moiety." — Fearne, Post. Works, 128–132.

"Occupancy. At common law if an estate for the life of A. was conveyed to B., and B. died, living A., any occupant of the land was entitled to retain the possession so long as the *cestui que vie* lived. Co. Lit. 41 b. And see *Skelliton* v. *Hay*, Cro. Jac. 554 (1618).

"If an estate for the life of A. was conveyed to B. and his heirs, or to B. and the heirs of his body, then, on B.'s death, the persons answering such designation became entitled as special occupants. *Salter* v. *Boteler*, Moore, 664 (1602); *Bowles* v. *Poore*, Cro. Jac. 282 (1610); *Low* v. *Burron*, 3 P. Wms. 262 (1734). See also *Ripley* v. *Waterworth*, 7 Ves. 425 (1802); *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662 (1842); *Wall* v. *Byrne*, 2 J. & L. 118 (1845); *In re Barber's Estates*, 18 Ch. D. 624 (1881); Sugden, Powers (8th ed.), pp. 193–195.

"By St. 29 Car. II. *c.* 3, § 12 (1677), and 14 Geo. II. *c.* 20, § 9 (1740), it was provided that the tenant of an estate *pur autre vie* might devise such estate, and that, if there were no devisee or special occupant, the term should be applied and distributed as part of the personal estate of the tenant.

"See Stimson, Am. Stat. Law, § 1335." 4 Gray, Cas. on Prop. (2d ed.), p. 29 note.

The passing of personal property on intestacy is considered later in connection with the general problems of administration.

CHAPTER III.

THE MAKING, REVOCATION, AND REPUBLICATION OF WILLS.

SECTION I.

STATUTES.

England.

STAT. 32 HEN. VIII., c. 1 (1540). — [Be it enacted [1]] that all and every person and persons, having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knights service, from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, Statute or other thing heretofore had, made or used to the contrary notwithstanding.

II. And that all and every person and persons, having manors, lands, tenements or hereditaments, holden of the king our sovereign lord, his heirs or successors, in socage, or of the nature of socage tenure in chief, and having any manors, lands, tenements or hereditaments, holden of any other person or persons in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of July in the said year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any law, Statute, custom or other thing heretofore had, made or used to the contrary notwithstanding.

III. Saving alway and reserving to the King our sovereign lord, his heirs and successors, all his right, title and interest of *primer*

[1] The preamble is omitted.

seisin and reliefs, and also all other rights and duties for tenures in socage, or of the nature of socage tenure in chief, as heretofore hath been used and accustomed, (2) the same manors, lands, tenements or hereditaments to be taken, had and sued out of and from the hands of his highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such and like manner and form, as hath been used by any heir or heirs before the making of this Statute; (3) and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the King our sovereign lord in socage, or of the nature of socage tenure in chief, whereof there shall be any alteration of freehold or inheritance, made by will or otherwise, as is aforesaid.[1]

STAT. 34 & 35 HEN. VIII., c. 5 (1542). — I. Where in the last Parliament begun and holden at Westminster the thirty-eighth day of April in the thirty-first year of the King's most gracious reign, and thereby divers prorogations holden and continued unto the twenty-fourth day of July in the thirty-second year of his said reign, it was by the King's most gracious and liberal disposition showed towards his most humble and obedient subjects, ordained and enacted how and in what manner lands, tenements, and other hereditaments might be by will or testament in writing, or otherwise by any act or acts lawfully executed in the life of every person, given, disposed, willed or devised, for the advancement of the wife, preferment of the children, payment of debts of every such person, or otherwise at his will and pleasure, as in the same Act more plainly is declared: (2) sithen the making of which Estatute, divers doubts, questions and ambiguities have risen, been moved, and grown, by diversity of opinions, taken in and upon the exposition of the letter of the same Estatute.

II. For a plain declaration and explanation whereof, and to the intent and purpose that the King's obedient and loving subjects shall and may take the commodity and advantage of the King's said gracious and liberal disposition, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, most humbly beseechen the King's majesty, that the meaning of the letter of the same Estatute, concerning such matters hereafter rehearsed, may be by the authority of this present Parliament enacted, taken, expounded, judged, declared and explained in manner and form following:

III. First, where it is contained in the same former Statute, within divers articles and branches of the same, that all and singular person and persons having any manors, lands, tenements or hereditaments

[1] See Stat. 34 & 35 Hen. VIII., c. 5, § 13 (1542). By the other sections of this Act of 32 Hen. VIII. it is provided that two thirds of land held by knight service may be devised.

of the estate of inheritance, should have full and free liberty, power and authority to give, will, dispose or assign, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, his manors, lands, tenements or hereditaments, or any of them, in such manner and form as in the same former Act more at large it doth appear. Which words *of estate of inheritance*, by the authority of this present Parliament, is and shall be declared, expounded, taken and judged of estates in fee-simple only.

IV. And also that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, of and in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements or hereditaments holden of the King, his heirs or successors, or of any other person or persons by knights-service, shall have full and free liberty, power and authority to give, dispose, will or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and other jointly, severally or particularly, or by all those ways, or any of them, as much as in him of right is or shall be, all his said manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure; any clause in the said former Act notwithstanding.

XIV. And it is further declared and enacted by the authority aforesaid, that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law.

Stat. 29 Car. II., c. 3 (1677). — V. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring

the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, that from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury; (2) be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or

next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the making of this Act.

XXIV. And it is hereby declared, that nothing in this Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this Act.

STAT. 25 GEO. II., c. 6 (1752). — Whereas by an Act made in the twenty-ninth year of the reign of his late majesty King Charles the Second, intituled, an *Act for Prevention of Frauds and Perjuries;* it is amongst other things enacted, that from and after the twenty-fourth day of June in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the Statute of Wills, or by that Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said Act; therefore, for avoiding the same, be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such

devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil.

II. And be it further enacted by the authority aforesaid, that in case, by any will or codicil already made or hereafter to be made, any lands, tenements or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act.

X. And whereas in some of the British Colonies or plantations in America, the said Act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or Acts of Assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements and hereditaments have been required; therefore, to prevent and avoid doubts which may arise in the said colonies or plantations, in relation to the attestation of such devises of lands, tenements and hereditaments; be it enacted by the authority aforesaid, that this Act, and every clause, matter and thing therein contained, shall extend to such of the said colonies and plantations, where the said Act of the twenty-ninth year of the reign of King Charles the Second, is by Act of Assembly made, or by usage received as law, or where by Act of Assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said Acts of Assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said Act of the twenty-ninth year of the reign of King Charles the Second in England.

STAT. 7 W. IV. & 1 VICT., c. 26 (1837). — Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition

by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service, and Purveyance, and for settling a revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.[1]

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this

[1] Section 2 repeals prior acts in regard to wills except so far as they relate to any wills or estates *pur autre vie*, to which this act does not extend.

Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.[1]

X. And be it further enacted, that no appointment made by will,

[1] See Stat. 15 & 16 Vict., c. 24 (1852).

in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such

appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distribution).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other Act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an Act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Illinois.

ANNOT. STATS. (1913), Par. 11542 (C. 148, Sec. 1). Be it enacted . . . that every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory, shall have power to devise all the estate, right, title and interest, in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents, charged upon or issuing out of them, or goods and chattels, and personal estate of every description whatsoever, by will or testament.

Par. 11543 (Sec. 2). All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record: *Provided*, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said county court, shall be deemed sufficient to invalidate or destroy the same; and every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed.

Par. 11549 (Sec. 8). If any beneficial devise, legacy or interest shall be made or given in any will, testament, or codicil to any person subscribing such will, testament or codicil, as a witness to the execution thereof, or to the wife or husband of such person,

such devise, legacy or interest shall, as to such beneficiary thereof, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses, exclusive of such person, according to this Act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner, as if no such devise or bequest had been made. But if such witness or beneficiary would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness or beneficiary as shall not exceed the value of the said devise or bequest made to him or her as aforesaid.

This Act being remedial in character shall be construed liberally, and shall apply to cases arising on wills of persons deceased, prior to the adoption of this Act, but not finally adjudicated.

Par. 11556 (Sec. 15). A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days after the making thereof, and proven before the county court by two or more credible, disinterested witnesses, who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory; and that he or she did at the same time, desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect; and that such will was made in the time of the last sickness of the testator or testatrix; and it being also proven by two disinterested witnesses, other than those hereinbefore mentioned, that the said will was committed to writing within ten days after the death of the testator or testatrix; and no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said court, shall be sufficient to invalidate or destroy the same; and all such wills, when proven and authenticated as aforesaid, shall be recorded in like manner as other wills are directed to be recorded by this Act: *Provided*, that no letters testamentary shall be granted on such will, until the expiration of sixty days after the death of the testator or testatrix.

Par. 11558 (Sec. 17). No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law.

Par. 11561 (Sec. 20). If any lands, tenements or hereditaments shall be charged with any debts, by any will, testament or codicil,

and the creditor whose debt is so secured shall attest the execution of the same, such creditor shall, notwithstanding, be admitted as a witness to the execution thereof.

Massachusetts.

REV. LAWS (1902), c. 135, Sec. 1. Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal, except an estate tail, and except as is provided herein and in chapters one hundred and thirty-one and one hundred and thirty-two and in section one of chapter one hundred and fifty-three.[1] A married woman, in the same manner and with the same effect, may make a will.

Sec. 2. If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the probate and allowance of such will, nor shall a mere charge on the land of the testator for the payment of his debts prevent a creditor from being a competent witness to his will.

Sec. 3. A beneficial devise or legacy which is made in a will to a subscribing witness thereto, or to the husband or wife of such witness, shall be void unless there are three other competent subscribing witnesses to such will.

Sec. 6. A soldier in actual military service or a mariner at sea may dispose of his personal property by a nuncupative will.

Sec. 7. No will, except as provided in this chapter and in chapter one hundred and fifty-three, shall pass any property, real or personal, or charge or in any way affect the same; and no will shall take effect until it has been duly proved and allowed in the probate court. Such probate shall be conclusive as to the due execution of a will.

Sec. 8. No will shall be revoked except by burning, tearing, cancelling or obliterating it with the intention of revoking it by the testator himself or by a person in his presence and by his direction; or by some other writing signed, attested and subscribed in the same manner as a will; or by subsequent changes in the condition or circumstances of the testator from which a revocation is implied by law.

Sec. 9. The marriage of a person shall act as a revocation of a will made by him previous to such marriage, unless it appears from the will that it was made in contemplation of such marriage. If the will is made in the exercise of a power of appointment and the real and personal property subject to the appointment would not, without the appointment, pass to the persons who would have been entitled to it if it had been the estate and property of the testa-

[1] The exceptions referred to in these statutes are in regard to homesteads, dower, and curtesy.

tor making the appointment if he had died intestate, so much of the will as makes the appointment shall not be revoked by the marriage.

Sec. 22. A devise shall convey all the estate which the testator could lawfully devise in the land mentioned, unless it clearly appears by the will that he intended to convey a less estate.

Sec. 23. An estate, right or interest in land acquired by a testator after the making of his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention manifestly and clearly appears by the will.

New York.

CONSOL. LAWS (1909), Decedent Estate Law, Sec. 10. All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article.

Sec. 11. Every estate and interest in real property descendible to heirs, may be so devised.

Sec. 12. Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.[1]

Sec. 14. Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

Sec. 15. Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing.

Sec. 16. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.[2]

Sec. 21. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

[1] Sec. 13 provided that devises of real property to aliens not authorized by statute to hold real estate were void. Devises to alien friends are now valid. New York, Laws (1913), cc. 152, 153.

[2] Secs. 17–20 deal with devises and bequests to certain societies, associations, and corporations.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

Sec. 22. The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

Sec. 27. If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will can not be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

Sec. 34. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

Sec. 35. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned

therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

Sec. 36. A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.[1]

Sec. 41. If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will.[2]

[1] Secs. 37–40 deal with contracts, mortgages, and conveyances affecting lands devised.

[2] The probate of a will is now conclusive as to real property. New York, Laws (1910), c. 578; Laws (1914), c. 443, p. 1775.

For other American statutes, see Stimson, Am. Stat. Law, §§ 2600 *et seq.*

SECTION II.

THE MAKING OF WILLS.

A. *Fraud and Undue Influence.*

KENNELL *v.* ABBOTT.

4 Ves. Jr. 802. 1799.

JAMES HICKMAN by his will, dated the 18th of April, 1782, gave to his wife Catherine £300 4 per cent Consolidated Bank Annuities; and appointed her sole executrix. Upon his death she possessed herself of his personal estate; paid his debts, &c.; and exhibited the probate to the bank; but not applying to be at liberty to transfer the stock into her own name, it continued to stand in the name of the testator.

In 1783 a marriage ceremony was performed between Catherine Hickman and Edward Lovell: but that marriage was void; Lovell having been married in 1775; and his wife being living. He cohabited with his wife till 1781. By articles executed previously to the marriage ceremony with Catherine Hickman, dated the 3d of January, 1783, she agreed to transfer the said stock upon the trusts therein mentioned, with power to her to dispose of it after the decease of the survivor of herself and Lovell. She never discovered the invalidity of her marriage; and being seised to her and her heirs of a copyhold estate, which she had surrendered to the use of her will, and being possessed of a leasehold estate for a long term of years determinable upon lives, and of personal estate, she made her will, duly attested according to the Statute of Frauds, describing herself the wife of Edward Lovell; and by virtue of the power and authority given her before her marriage with her present husband Edward Lovell, she publishes and declares her last will and testament; giving the said £300 stock to her brother Thomas Abbott, in trust to pay the interest to her niece Betty Kennell for life; and after her decease the principal to be equally divided between her two daughters share and share alike. She gave some leasehold premises to her nephew Martin Togood, his executors and administrators. She gave a copyhold estate, which she had surrendered to the use of her will, to her brother Thomas Abbott and his heirs, in trust to sell, and out of the moneys arising therefrom to pay the following legacies: "to my husband the said Edward Lovell the sum of £150;" to her brother Thomas Abbott £20; to her nephew James Fabian, her niece Elizabeth Cox, and her nephew George Togood, £10 each; and she directed these legacies to be paid within twelve months after her decease. She gave another leasehold

estate to her great niece Catherine Kennell, her executors, &c., and she gave all her household goods, plate, furniture, and stock in husbandry, to her brother Thomas Abbott, his executors and administrators, in trust to sell, and out of the produce, to put in the life of her said great niece into the said leasehold premises, if she (the testatrix) should not do it in her life. She gave her wearing apparel and linen to her niece Betty Kennell; and as to the residue of the purchase-money arising from the sale of her said copyhold estate, household goods, and furniture, and all the rest, residue, and remainder, of her moneys, securities for money, personal estate and effects, whatsoever and wheresoever, that she should die possessed of, interested in, or entitled to, or whereby she had power to dispose by will, she gave to her said niece Betty Kennell, her executors and administrators, subject to her debts and funeral expenses; and she appointed Thomas Abbott guardian of the children of Betty Kennell, and appointed Betty Kennell executrix.

The testatrix died; leaving Edward Lovell surviving her, and John Abbott, her eldest brother, her heir-at-law. Betty Kennell proved her will: but the probate was limited to the £300 stock, and £100 stock supposed to be standing in the name of, and purchased by, the trustees, under the articles of the 3d of January, 1783. Edward Lovell died; leaving an infant son by his lawful wife Ann Lovell; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of Catherine Hickman; praying, that the trusts of her will may be established, except so far as relates to the bequest to Edward Lovell and the lapsed legacy to James Fabian, who died in the life of the testatrix, and to the guardianship of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The question arose upon the legacy of £150 given to Edward Lovell: which was claimed on the part of his infant son: Supposing that legacy void, it was claimed by the residuary legatee by the heir, and also by the next of kin.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] This case has stood a long time; and I believe, the reason I have not been desired to give my judgment, is, that it has abated; and perhaps it may be unnecessary to give it. But as upon very full consideration I have made up my mind, it may be of use, that the parties may know my opinion, in case they think fit to revive it.

The cause arises upon the will of Catherine Hickman; who supposed herself to be married to Edward Lovell; with whom she had celebrated a marriage. It now appears that he was a married man at that time; therefore she is in fact a single woman; and it was a gross fraud as to her. She made her will in execution of the power given to her by the articles executed previously to the supposed marriage; and not aware that she was a single woman. Upon that will the questions arise. The first question is, whether this legacy

of £150 charged upon the produce of the sale of the copyhold estate devised in trust to be sold is or is not a legacy, which this man can claim under the circumstances that it is given to him as the husband of the testatrix; though he does not possess that character. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England; though there are some *dicta* in the civil law, that seem to bear upon the point. The passage cited from the Code, I think, does not much apply. The passage in the Digest is: "Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

The meaning is, that a false reason given for the legacy is not of itself sufficient to destroy it: but there must be an exception of any fraud practised; from which it may be presumed, the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the civil law.

The question is, whether according to the law of England that can apply to a case like the present; and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this; but upon general principles I am of opinion, it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine, that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail: for circumstances of personal affection to the child might mix with it; and which might entitle him; though he might not fill that character in which the legacy is given. My decision therefore totally avoids such a point. Neither would I have it understood, that if a testator in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon

now to determine, whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent; and to determine, that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.

A case (*Ex parte Wallop*, 4 Bro. C. C. 90) something like this occurred lately; which took up so much time before the Lords Commissioners upon an application for a writ *de ventre inspiciendo* against a woman, who had lived with Mr. Fellowes, and had made him believe she had been brought to bed of several children: which he was weak enough to suppose his. It was not a question whether they were his children; for if so, I do not apprehend the decree would have been such as it was. But there were no such children. She had shown him children as hers, which were not hers; and he gave legacies to them, as her children by him. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character in which he gave them the legacies; for they were not the children of that woman. Therefore, upon the principle I have mentioned from the Digest, and that ought to govern courts of justice, I am of opinion this legacy could not be claimed.

[The Master of the Rolls then considered the question, whether the legacy would fall into the residue, and he determined that it would. This part of the opinion is omitted.[1]]

[1] "Here it is said that the fraud was not committed for the purpose of obtaining the will. I cannot agree in this. Though we term the conduct alleged in this case fraudulent concealment, it is equivalent to fraudulent misrepresentation. When the lady went through the ceremony of marriage with the testator, she in effect represented to him that she was capable of becoming his lawful wife, and every day while they were living together she must be taken as continuously representing to him that she was his lawful wife. If at the same time she knew that her former husband was alive, this was what the court would take notice of as a fraudulent misrepresentation. For what purpose were these representations made? To obtain all the benefits of the position of the testator's lawful wife, and a testamentary provision in case she survives her husband, is one of the advantages which a wife most naturally expects. The misrepresentations must, therefore, be treated as made, among other things, for the purpose of obtaining a will in her favor, and it makes no difference whether this particular advantage was actually present to her mind or not." — *Per* MELLISH, L. J., in *Meluish* v. *Milton*, 3 Ch. D. 27, 34, 35.

"The right of the infant, Sarah Ward, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his stepdaughter, the bequest to her wholly fails. But in the case referred to of *Kennell* v. *Abbott*, 4 Ves. 802, Lord Alvanley took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description.

WINGROVE *v.* WINGROVE AND OTHERS.

11 P. D. 81. 1885.

THE plaintiff as a legatee propounded a will dated the 15th of September, 1869, of Elizabeth Wingrove, late of 87 Long Lane, West Smithfield, and alleged that a codicil dated the 9th of October, 1880, which revoked some of the gifts to him, was procured by the undue influence of the defendants. The defendants in the statement of defence denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action had been tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside and a new trial ordered by a special jury.

The burden of proving the undue influence being upon the plaintiff, his counsel opened the case.

SIR JAMES HANNEN (President), in addressing the jury said: Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension.

The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence;" we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person

Sarah Ward, therefore, is entitled under the will." — *Per* SIR JOHN STUART, V. C., in *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319, 322.

See also *Moore* v. *Heineke*, 119 Ala. 627; *Estate of Cahill*, 74 Cal. 52; *Estate of Benton*, 131 Cal. 472, 478; *Smith* v. *Dubose*, 78 Ga. 413; *Jones* v. *Grogan*, 98 Ga. 552; Georgia, Annot. Code (1914), § 3836; *Will of Donnelly*, 68 Iowa, 126; *O'Connell* v. *Dow* 182 Mass. 541; *Collard* v. *Collard*, 67 Atl. (N. J.) 190; *In re Webb's Will*, 33 N. Y. Supp. 968; *Howell* v. *Troutman*, 8 Jones (N. C.), 304; *Rishton* v. *Cobb*, 5 Myl. & Cr. 145; *Re Boddington*, 50 L. T. R. N. S. 761; *Anderson* v. *Berkley*, [1902] 1 Ch. 936; *In re Wagstaff*, [1908] 1 Ch. 162; *In re Hammond*, [1911] 2 Ch. 342.

Compare *Case of Broderick's Will*, 21 Wall. 503, 510–512; *Luttrell* v. *Olmius*, cited in 11 Ves. Jr. 638, 14 Ves. Jr. 290 (sub nom. *Lutterel* v. *Waltham*); *Allen* v. *M'Pherson* 1 H. L. C. 191. And see *Lewis* v. *Corbin*, 195 Mass. 520.

On the refusal to probate part of a will because procured by fraud or undue influence, see *Old Colony Trust Co.* v. *Bailey*, 202 Mass. 283.

with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favor. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."

If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence.

There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.[1]

[1] "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment

EMERY AND OTHERS *v.* EMERY, EXECUTRIX.

222 Mass. 439. 1916.

APPEAL from a decree of the Probate Court for the county of Suffolk allowing a certain instrument dated September 7, 1897, as the last will of Samuel W. Emery, late of Boston.

On appeal to the Supreme Judicial Court the case was sent to the Superior Court for the trial of the single issue, "Was the execution of the instrument propounded for probate procured to be made through the fraud or undue influence of Mary E. B. Emery?"

The issue was tried before WHITE, J. The evidence is described in the opinion. At the close of the evidence the appellee asked the judge to make, among others, the following rulings:

"1. Upon all the evidence the court must instruct the jury that the issue submitted to them must be answered in the negative.

"2. There is no evidence from which the jury can find that the instrument here in question was procured by the fraud or undue influence of Mary E. B. Emery, and the question submitted to them must be answered in the negative.

"3. [To show undue influence in the procurement of the execution of the will, it must be found as a fact that the person accused of undue influence must have consciously and intentionally exercised such influence with the wrongful purpose to compel the testator to subordinate his own intentions to hers.] There is no evidence of such influence in this case and the jury must be instructed to answer the issue submitted to them in the negative."

The judge refused to make the first and second rulings requested or to make the part of the third ruling contained in the last sentence of it. He gave as an instruction to the jury the part of the third ruling enclosed in brackets and also made four other rulings requested by the appellee.

The jury returned an affirmative answer to the question submitted to them; and the appellee alleged exceptions.

BRALEY, J. The executrix and widow of the testator having offered the will for probate, the testator's children by a former

of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's." — *Per* SIR J. P. WILDE in *Hall* v. *Hall*, L. R. 1 P. & D. 481.

marriage contested its allowance on the ground that the instrument had been procured to be made through fraud or undue influence of the widow, to whom and to her two sisters, one of whom had been adopted by him, he bequeathed the bulk of his property. The jury having decided in favor of the contestants, the case is here on exceptions of the proponent to the refusal of the presiding judge to rule that as matter of law there was no evidence of fraud or undue influence, and that the question submitted must be answered in the negative.

We assume on the record, that apart from this request full and appropriate instructions were given, and there are no exceptions to the admission of evidence, which ranged approximately from four years before the date of the will to two years thereafter. The first marriage, the birth of the children, the divorce proceedings of the first wife, who has survived her former husband, the second marriage and the adoption were uncontroverted, and there was no direct evidence that the widow ever induced or sought to induce her husband to make any testamentary disposition of his property.

The nature of fraud or undue influence sufficient to vitiate a will has often been defined. *Whitcomb* v. *Whitcomb*, 205 Mass. 310, and cases cited. It may be produced by unceasing importunity or by the silent yet resistless power which a strong will exerts over a less forceful and resolute individuality. The boundary, where legitimate influence on the part of a wife to persuade her husband to make a testamentary disposition of his property in compliance with her wishes ends and illegitimate persuasion or coercion begins, cannot be ascertained with the accuracy of mathematical demonstration. *Hall* v. *Hall*, L. R. 1 P. & D. 481. While the fundamental law is certain, the facts vary with the circumstances of each case. It needs no discussion to make evident that where either spouse is charged with having overcome the volition or free agency of the other, the very relation of husband and wife, as well as the nature of the wrong, generally preclude the procuring of direct testimony, and resort to proof of circumstances which are admissible to establish the charge becomes necessary. *Woodbury* v. *Woodbury*, 141 Mass. 329, 331. *Hoffman* v. *Hoffman*, 192 Mass. 416. *Old Colony Trust Co.* v. *Bailey*, 202 Mass. 283. *Aldrich* v. *Aldrich*, 215 Mass. 164. The evidence, of course, must show that the testator disposed of his property differently than he would have done if he had been left free to exercise his own judgment. Or, in other words, the issue is, was such influence exerted and, if so, did the testator yield to it?

The question now recurs, Is there any substantial evidence warranting the verdict? The bare record cannot reproduce the environment of the trial. The appearance of the witnesses, their manner when giving evidence, the indefinable something constituting personality, were all before the jury but are absent from the printed page. They could have found that before the divorce the testator

conceived a passionate fondness, which was reciprocated, for the woman who became his second wife, and that after marriage the affection and loyalty springing from the relation became so preponderant as to lead him to act in conformity with her feelings and desires in all matters appertaining to his former marital and parental affiliations. It was after three years of married life, and within a year before the execution of the will, that he said to his eldest son, who desired to obtain a college education and applied to his father for assistance: "I can't do anything to help you because it will simply make trouble for me with my wife there in the family. They will find fault and I just can't do it. It is impossible the way I am fixed; the situation I am in now." It further appeared from the son's evidence, which was admissible under the rule of *Shailer* v. *Bumstead*, 99 Mass. 112, that two years after the date of the will the testator sent for him and gave him money for this purpose, saying: "It is upon this express condition, that you will not under any circumstances say, that I am doing it for you or let any one know it, because the minute that my wife finds this out it will be all over. I shall have to stop it and I can do nothing further." The son, having received and partially expended the amount, again was sent for when the testator said, "that his wife had found it out . . . and it was all over. . . . I can't do another thing. . . . There is all kinds of trouble for me, and I can't do anything more, and I must have that money back, and this thing must be closed up." Upon being told how greatly his son relied upon him for aid and of the partial expenditure, the reply was: "I have tried to do my best, and tried to do this thing, but it has got to a point where I can't. You had better go right out and take the things back that you have got and get the money back and give it to me." The request or command was complied with and the money was returned. The foundation having been laid by evidence tending to establish a previous mental condition, this testimony showing its continued existence would warrant the jury in finding, that when he prepared and executed the will the testator acted in complete subordination to his wife's purpose that no part of his property should ever be enjoyed by the children. The R. L. c. 135, § 1, conferred the right to dispose of his estate as he pleased even if his children were practically disinherited, and there are portions of the record which standing alone support the view ably urged by counsel for the will, that it expressed the uninfluenced determination and intention of the testator. But the jury were not restricted to single instances. The life and conduct of the husband and father within the period of inquiry had been fully portrayed, from which more than one inference properly could be drawn. It was for them to determine under suitable instructions whether the testator, "a strong man of good intellect and a good lawyer," having paid by way of alimony a large sum to his first wife and later by order of the court a further allowance for the

support of his minor children, which together amounted to a very appreciable portion of his entire property, felt that they had no further just demands on his bounty in view of his subsequent obligations, or whether he succumbed to the over-persuasion or influence of his wife, and disregarded the ordinary feelings of parental affection and of solicitude for the future welfare of his children. It may be the conclusion they reached was erroneous in fact. We are not concerned however with the weight of evidence or the credibility of witnesses; that was for the judge to determine on a motion for a new trial. And, the verdict as matter of law not having been unwarranted, the exceptions should be overruled.

So ordered.[1]

[1] "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud.

"I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your Lordships have now to deal.

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion, or fraud.

"One point, however, is beyond dispute, and that is, that where once it has been

PARFITT *v.* LAWLESS.

L. R. 2 P. & D. 462. 1872.

THE plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the Statute 1 Vict. *c.* 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff. Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at £63,000, and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely

proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it." — *Per* LORD CRANWORTH, C., in *Boyse* v. *Rossborough*, 6 H. L. C. 2, 47–49.

In *Estate of Ruffino*, 116 Cal. 304, the court said, pp. 315–316: "The question, in the absence of fraud, always is whether the proposed will is the spontaneous act of a competent testator. If not, it makes no difference what the moral qualities of the influence may be which has overcome the will of the testator. If the importunities of a wife have destroyed the free will of a testator, the will is void. If the importunities of a mistress have not overcome the will of a testator, the will is not void, though made in favor of the mistress. Influence which has prevented an unnatural, an unjust, and a vicious will, by overcoming and controlling the testator to the extent that the will is not the spontaneous act of the testator, is unlawful — as much so as the same influence would be if exerted in the opposite direction. The question is as to the effect of the influence upon the testator's mind, not as to its moral character or its source, although in some cases the character of the person exerting the influence may be an important factor in determining its effect."

See also *Alford* v. *Johnson*, 103 Ark. 236; *Estate of Cahill*, 74 Cal. 52; *Dickerhoof* v. *Wood*, 267 Ill. 50; *Barr* v. *Sumner*, 107 N. E. (Ind.) 675, 681; *Ginter* v. *Ginter*, 79 Kan. 721; *Brent* v. *Fleming*, 165 Ky. 356, 358–359; *Johnson's Estate*, 159 Pa. 630; *Stirk's Estate*, 232 Pa. 98; *Buck* v. *Buck*, 122 Minn. 463, 469; *In re Van Ness' Will* 139 N. Y. Supp. 485, 514; *In re Craven's Will*, 169 N. C. 561, 568; *Baudains* v. *Richardson*, [1906] A. C. 169, 184, 9 Am. & Eng. Ann. Cas. 783 note; 28 *ibid.* 143 note; 31 Am. St. Rep. 670 note; 17 L. R. A. N. S. 477 note.

"In strictness undue influence and fraud are distinguishable. In one case the mind of the testator is so overmastered that another will is substituted for his own. In the other he is in a sense a free agent but is deceived into acting upon false data (citations). But more often than otherwise it is a mere question of terms. Something sinister is involved which perverts the testator's will by overcoming his power truly to express his desires." — *Per* BURCH, J., in *Ginter* v. *Ginter*, 79 Kan. 721, 735–736. See also *Council* v. *Mayhew*, 172 Ala. 295, 308–311; *Shirley* v. *Ezell*, 180 Ala. 352, 358; *Phillips* v. *Gaither*, 191 Ala. 87; *Estate of Snowball*, 157 Cal. 301; *Hoppers* v. *Sellers*, 91 Kan. 876, 884; *Whitcomb* v. *Whitcomb*, 205 Mass. 310; *Ball* v. *Boston*, 153 Wis. 27, 34.

subject to an annuity for life of £2,500 to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7,000. The will propounded was divided into two parts: by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor. The question at issue was tried before LORD PENZANCE and a special jury on the 20th and 21st December, 1871. The defendant, upon whom the burden of proof lay, produced several witnesses, but the court held he gave no evidence to go to the jury. With the leave of the court his counsel then called the plaintiff and examined and ultimately cross-examined him as a hostile witness, but the court still held that no sufficient case of undue influence to go to a jury had been offered, and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before LORD PENZANCE, MELLOR and BRETT, JJ., an application for a new trial was made on the ground of misdirection, and a rule *nisi* was ordered to issue, which came on for argument before LORD PENZANCE, PIGOTT, B., and BRETT, J.

Cur. adv. vult.

July 25. LORD PENZANCE. This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the courts of equity in relation to gifts *inter vivos* ought to be applied to the making of wills. In equity, persons standing in certain relations to one another — such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward — are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by

undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth, in *Boyse* v. *Rossborough*, 6 H. L. C. at p. 49, "and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment." *Archer* v. *Hudson*, 7 Beav. 551.

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the rela-

tion in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Williams' Executors, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will or legacy, is all-important when a question arises of making presumptions or adjusting the burden of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another, by way of personal advice or persuasion, has availed himself of the natural influence which his position gave him. And in casting upon him the burden of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only.

I now proceed to examine the evidence, upon the assumption that the defendant was bound to prove the issue he raised, and that it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the plaintiff. And upon this assumption the question is, Whether the evidence which the defendant gave ought to have been submitted to the jury? The argument on this head betrayed, I think, some confusion as to the nature and limits of the question, whether there is in any case evidence for the jury. For instance, it was urged as each separate fact or piece of evidence came to be commented upon,

that it was not for the court but the jury to assign its due value to such fact or evidence. If this were so it would be unjustifiable for the judge in any case to withdraw the evidence, however slight, or even irrelevant, from the jury. For to ascertain that it is slight or irrelevant the judge must assign a meaning and a value to it, and this might not be the same value or meaning which it would bear in the eyes of the jury. I conceive, therefore, that in judging whether there is in any case evidence for a jury, the judge must weigh the evidence given, and must assign what he conceives to be the most favorable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

Again, it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If this proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary legatee. For, upon this basis of fact, suspicion freely indulged and directed by eloquent comment might easily build up the fabric of undue influence or even fraud. It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

I have been thus far particular in endeavoring to draw the line between that which rests upon proof, and that which rests on suspicion only, because in this case I thought the defendant's argument wholly confounded them. The propositions which he was bound to give reasonable evidence to establish were these: that the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal), but by some coercion or dominion exercised over the testatrix against her will or by importunity so strong that it could not be resisted.

I have looked through the evidence in vain to find reasonable proof of any one of these three propositions. As regards the making of the will the defendant took a most unusual course. For the sake of having the first and last word with the jury, he withdrew the pleas which would have put the plaintiff on proof of the will, and gave no evidence of its execution himself. The consequence was that the attorney, who received the instructions from the testatrix, who made the will, and who, it must be presumed, knew the circumstances under which it was made, and the reasons upon which the testatrix acted so far as she allowed them to be known, was not called as a witness; nor were the attesting witnesses, nor was their place supplied by any other evidence. The making of the will and everything connected with it was left an absolute blank. Literally the only proof which was offered to show that the plaintiff had anything to do with it, consisted in the fact that he was in London about the time that the will bears date, that he and the testatrix were seen together at the house of a relation of his, and that they were also seen at the exhibition. Whether the plaintiff knew what the testatrix had done for him in the will, is a point to which much cross-examination and much argument was directed. He denied it, but admitted many things from which a doubt of his denial may be inferred. But in my mind this matter is immaterial. The fact of his knowing the contents of the will after it was made is some proof that he was in the testatrix's confidence, but it has no tendency, as it seems to me, to support the conclusion that he had himself interfered in the making of it.

It is at this point of proving the plaintiff's interference that the evidence wholly fails. But that I may not do the defendant any injustice, I will recapitulate the whole of what was proved on this head. The plaintiff was the confessor of the testatrix. He knew, from what she told him, that she probably had power over the disposition of the estate in case of her stepson's death before her, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney, and he told her. This attorney was the person who afterwards in London made the will. She told the plaintiff at some time that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time legacies that she wished paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will of 1868, which was made after two of them at least had been thus noted by the plaintiff. There is

not a single fact in this enumeration, as it seems to me, which is not quite as consistent with the testatrix having told the plaintiff what she had done, after she had done it, as with the plaintiff having had any hand in doing it; and it would, I think, defy ingenuity to demonstrate that from any one of these facts a reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will.

But if the evidence fails thus signally to establish the first proposition, with what pretence of reason can it be held to support this much larger proposition, namely, that the plaintiff not only advised the residue to be left to himself, but forced this disposition upon the unwilling testatrix? And yet that is what the defendant has undertaken to prove. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside this will, so long as the free volition of the testatrix to accept or reject that advice was not invaded. And what, it must therefore be asked, is the proof that any attempt ever was made to control her free will? There was not a fact, a word, or an event proved which showed that on any occasion the testatrix had subordinated her own will to that of the plaintiff. It was stated, indeed, that he managed her affairs for her; but even this was confined to the last three years of her life, many years after the date of the will, and at a time when her health had failed. But of evidence to show that, in the common affairs of life, or in business, or anything else, she was under the plaintiff's dominion, there was an absolute and total dearth. The only fact that pointed to her having been ever controlled by anybody in anything, was this that when asked by Miss O'Rourke why she did not tell Mr. De Ruffière that she had power to devise the estate, she replied, "They won't let me." At this time she had consulted her attorney, Mr. English, and perhaps Mr. Ward, and she had been in communication also with her stepson, Mr. Conolly, for he spoke of what he expected she would do with the property; and for aught that is known she had consulted other persons; and yet these words, "They won't let me," were argued to establish the following chain of reasoning. Some one had told her not to tell Mr. De Ruffière; therefore the plaintiff was the person who had done so. She wished to tell Mr. De Ruffière; therefore the person who gave the advice controlled her. If he controlled her in this, he must have controlled her in all other things; therefore he controlled her in making a a will; therefore he controlled her in leaving the residue to himself. Unless this reasoning is satisfactory, there is not only no evidence of this control, upon which everything turns, but there was hardly an attempt to establish it. The plaintiff had lived in the house with the testatrix for years, and any control of his over her, if it existed, must have been visible to servants or some of the numerous friends who visited at the house. The defendant himself and his

wife were called as witnesses, and had been frequently visiting at the house; and yet no question was asked them on the subject. Miss Martin, a friend and visitor, was also called, but not a question was asked her upon it. The only other witness was Miss O'Rourke. She had lived a year with the testatrix in 1856, visited her again for weeks in 1860, again in 1862, and again in 1866; and even of her no questions were asked by the defendant's counsel as to any dominion exercised in anything, however serious or however trivial, by the plaintiff. But she was cross-examined upon it, and then she said the testatrix was a clever person, who had a pretty firm will of her own, and that she never saw anything which led her to believe that the plaintiff ever induced her to do anything which she did not wish to do of her own accord. No other visitor, friend, or servant was produced, and the case was actually closed without a question being put by the defendant's counsel to any witness as to the existence of a dominating influence on the part of the plaintiff over the testatrix, either in relation to her testamentary dispositions or anything else. Then in the last resort the defendant called the plaintiff himself, and was allowed to cross-examine him; and, strange as it may appear, no instances or occasions were put to the plaintiff on which he was alleged to have controlled the testatrix, and he was allowed to leave the witness-box without being challenged to admit any facts from which the habitual exercise of dominion might be inferred. Unless, therefore, it is just and right to conclude in all cases that a Roman Catholic priest, holding the position of confessor, must be held to possess and exert over those whom he confesses such a dominion as to extinguish their free will in the disposition of their property, there were no materials, in my opinion, from which such a conclusion could be drawn in the present case, and therefore no evidence for the jury.

There remains one fact to be noticed. The testatrix is proved to have told her niece, Miss O'Rourke, that if she wished to leave money for the saying of masses, or other purposes of religion, she must not express her trusts in her will, but leave the money to her confessor, and tell him privately what she wished. This statement greatly strengthens the suspicion to which the general facts of the case are calculated to give rise, that this devise of the residue to the plaintiff was in reality accompanied by some secret trust for religious purposes. Whether there be such a trust in this case it is not for this court to investigate. Whether the possibility of such trusts existing, and eluding the power of courts of justice to drag them to light, ought or ought not to induce the legislature to place any new restraints upon bequests or devises for ministers of religion, it is not for this court to suggest, still less to assert. But one thing is plain; if this testatrix really did intend her property to be applied for the saying of masses, or for charities or other religious objects, and confided in her confessor to see that her objects were attained,

she was, in the making of this will, carrying out her own wishes; she was intent on achieving an end of her own for the ease of her own mind, and was obeying the impulses of her own religious faith, all of which is hardly consistent with the notion of her having acted under the dictation of another.

The rule will be discharged with costs.

(His Lordship further stated that MR. JUSTICE BRETT concurred in this judgment entirely, both in reference to the law and as to the facts, and that MR. BARON PIGOTT also concurred, but with hesitation. He regarded the whole case as full of suspicion and mystery. His doubts arose only as to the effect of the evidence, and he quite agreed in the directions it contains on the point of law.)

Rule discharged.[1]

DOWNEY *v.* MURPHEY, ET AL.

1 Dev. & B. (N. C.) 82. 1834.

. . . THIS was an issue of *Devisavit vel non* as to a script produced by the plaintiff as the will of John G. Smith.[2]

On the trial before *Norwood*, J., at Granville, on the last Spring Circuit, the plaintiff having made out a *prima facie* case, by proof of the formal execution of the supposed will, for the defendants, the caveators, it was objected, that the deceased, at its execution, was not of perfect memory, and if he had been, that he was at its execution weak in body and mind, and *in extremis*, and that the execution by the supposed testator was, under these circumstances, procured by the fraudulent practices of the plaintiff, who was the executor, and took a large beneficial interest under the supposed will.

Upon the issue much testimony was offered by both parties. It was alleged by the defendants, that the supposed will never had been read over to or by the testator; to establish the contrary, the plaintiff, among other things, endeavored to prove, that an interlineation near the end of the paper, was in the handwriting of the

[1] See also *Ginter* v. *Ginter* 79 Kan. 721, 743; *Goodbar* v. *Lidikey*, 136 Ind. 1; *Denning* v. *Butcher*, 91 Iowa, 425; *Tyson* v. *Tyson*, 37 Md. 567; *Matter of Kindberg*, 207 N. Y. 220, 228–229.

In the following cases it was held that the doctrine of equity as to gifts *inter vivos* should be applied to wills. *St. Leger's Appeal*, 34 Conn. 434; *Hills* v. *Hart*, 88 Conn. 394 (*semble*); *Morris* v. *Stokes*, 21 Ga. 552, 575; *Cash* v. *Dennis*, 159 Iowa, 18; *Hartlerode's Estate*, 183 Mich. 51; *Meek* v. *Perry*, 36 Miss. 190, 252; *Byrne* v. *Byrne*, 250 Mo. 632, 646. See *Ryan* v. *Rutledge*, 187 S. W. (Mo.) 87 .

Compare *Lockridge* v. *Brown*, 184 Ala. 106; *Keeble* v. *Underwood*, 69 South. (Ala.) 473; *Estate of Lavinburg*, 164 Cal. 536; *Estate of Packer*, 164 Cal. 525; *Adams* v. *First M. E. Church*, 251 Ill. 268, 276; *Yess* v. *Yess*, 255 Ill. 411; *Kelly* v. *Burgess*, 84 Kan. 678 (statute); *In re Cooper's Will*, 75 N. J. Eq. 177, 76 N. J. Eq. 614; *Estate of Banard*, 83 N. J. Eq. 286; *Will of Everett*, 153 N. C. 83; *In re Diggins' Estate*, 149 Pac (Oreg.) 73; *Scattergood* v. *Cummins*, 192 Pa. 263; *Phillips Estate*, 244 Pa. 35, 43.

[2] Part of the case is omitted.

deceased. The deceased, when in health, was a man of a clear head, an acute intellect, and of decided business habits; but at the time of the execution of the will was laboring under a lingering disease, which had prostrated his physical powers, and had affected his understanding, as was contended by the defendants.

It was admitted that the will was in the handwriting of the plaintiff, who was a favorite nephew and confidential agent of the deceased; but it was contended that it was written from instructions given by the deceased. . . .

His Honor, in his charge to the jury, informed them, that in order to the validity of a will, the testator must have a sound and disposing mind and memory; but that though his mind might be weakened or impaired from age and bodily infirmity, still if he retained intellect enough to make a rational disposition of his estate, it was sufficient: that as with a deed, so with a will, in general, if executed by the party, it was sufficient, though not read over, or the contents thereof shown to be known to him — the act of execution recognizing and adopting the instrument. But that there might be circumstances which would require a different rule; that a will being written by a legatee, was looked upon as a suspicious circumstance, the suspicion being greater or less according as the interest was greater or smaller; and that where a will was written by one taking a large and beneficial interest under it, for a testator, in his last illness, and under great weakness from disease, and the writer was a confidential agent and adviser of the testator, it was necessary, in support of the will, to produce some evidence to show a knowledge by the testator of its contents, as that it was read to him or by him; or if not so read, proof that it was written from instructions by the testator, and according to them, would be sufficient, as showing that he knew the contents; that for this purpose the testimony as to the interlineation being in the handwriting of the deceased was submitted to them, and if in his handwriting, it would be important evidence; the evidence and the inference to be drawn from it, was for them.

A verdict was returned for the caveators, and the plaintiff appealed.

RUFFIN, C. J. [considered the questions of evidence, the statement of which has been omitted, and then continued thus:] Having considered these points, that which arises upon the instructions to the jury is next presented. It is one of much importance, both in its bearing upon the interests of these parties, and as a general question of law. His Honor first stated to the jury, as we conceive, correctly, that to the validity of a will a disposing capacity was necessary, and a knowledge of the contents of the instrument; and that in point of law, such a knowledge was presumed from the fact of execution, if the capacity was satisfactorily established. But he further stated, there were cases which required a different rule; and, applying the

exception to the case before him, he proceeded to lay down these principles to the jury: That a will being written by a legatee was in law a suspicious circumstance; the suspicion being greater or less in proportion to the interest; that when a will was written, by one taking a large and beneficial interest, for a testator in his last illness, and great weakness from disease, and the writer was a confidential agent and adviser of the supposed testator, it was necessary in support of the will, to produce some evidence to show a knowledge by the testator of the contents of the will, as that it was read to him, or by him, or, if not so read, that it was written from instructions and according to them, which would be sufficient.

The instructions assume that in point of law, the validity of the will depends upon such proof; and that in such a case, the inquiry is not one of fact, whether the maker of the instrument actually knew, or was actually ignorant of the contents of the paper; but is an inference of law, either that he did not know them, or that it does not appear, and it ought to appear, by plain proof, that he did know them. The correctness of the instructions depends therefore upon the inquiry, whether by the laws of this State, these are inferences of fact to be drawn by the jury, or are to be stated by the court as fixed legal principles.

In support of the opinion of the court, many cases have been read from the ecclesiastical courts of England; in which the rules laid down to the jury are stated as *rules* or *principles*, which govern those courts. But those cases and the terms in which the judges deliver themselves, are far from satisfying us, that the nature of the inquiry makes it, in a court of common law, the province of the judge and not the jury to determine it. The Court of Probate in England decides every question both of law and fact, which the case presents; the capacity of the testator, in all its various gradations as perfect, doubtful and defective. Where of the last kind, the instrument is necessarily inoperative under all circumstances. But where a testable capacity is found, the degree of proof that the instrument was freely executed, and that its provisions were really assented to by the maker, must necessarily vary with the degree of capacity, in order to satisfy a rational mind, that there was such free agency, knowledge and assent as the law demands. That tribunals such as the ecclesiastical courts, constituted of a single judge, holding the court permanently, and deciding the whole case, should, in the course of repeated discussions of evidence of a similar kind, adopt, for the ease of the court, and for the information of suitors, some propositions, as the measure of that proof, to be deemed sufficient or insufficient under particular circumstances, is not surprising. To the usefulness of such a court, such rules, as *principles* for the government of the judge, are indispensable. They are requisite, both to relieve the judge from unnecessary *labor*, and to exclude the suspicion and the danger of unlimited and irresponsible

discretion upon all questions of fact; which in a permanent magistrate is intolerable. Hence, in the very able opinions which have been delivered by the judges of those courts, are constantly found expositions of the reasons on which the credit to be given to the witnesses ought to rest, and on which inferences of particular facts may be rationally drawn from certain evidence; and such reasons, and the determination to which they led in one case, are naturally appealed to by counsel, and acknowledged by the court in succeeding cases. At first they may be respected only as the conclusions of an able, well-instructed and experienced mind, well calculated to influence another mind to adopt the same conclusions. But they soon acquire the authority which a succeeding judge is neither able nor willing to deny to them, of being *precedents*. For, as has been forcibly remarked, it is the professional tendency to repose on precedents; and it is fortunate for the institutions of every country, that there is such a tendency.

That the principles upon which the Ordinary in England requires particular proof, to rebut the presumption of fraud in obtaining a will from a man of weak or impaired faculties, are obligatory upon each succeeding judge who may sit in those courts, seems to be a settled point in those courts. Nor can it be denied that those principles have been most carefully considered and cautiously settled. They address themselves forcibly to every rational mind; and were most properly urged against the instrument offered for probate in this case. The court is not to be understood as pronouncing them insufficient to repel all the presumptions drawn from the execution of the instrument by a testator in the condition of mind and body imputed to Mr. Smith by the witnesses. Upon its sufficiency or insufficiency this court would carefully abstain from intimating any opinion; and allusion is made to it, only to prevent the supposition, that our decision rests on a difference of opinion between us and His Honor upon the weight to which the evidence was entitled. On the contrary, we think the question is, whether either court can determine its weight; in other words, whether the inquiry be one of fact or law. That question cannot be determined by the decisions of the ecclesiastical courts, for whether the nature of the inquiry be of the one kind or of the other, the remarks, rules, principles, by which one great judge was guided in the discussion, weighing and deciding on evidence of a particular character, in a particular case, would be authoritative on another upon the like evidence in a like case. The question depends upon the nature of the inquiry according to the common law of England, and the Statute laws of this State. For although the question is one of probate, and therefore might appropriately be governed by that portion of the ecclesiastical law which is incorporated into the common law and administered in peculiar jurisdictions; yet it has seemed good to the legislature to refer it to a tribunal of a different nature, a

jury. That tribunal is the favorite of the common law as the arbiter of facts; and not less so with the legislature of this State than with our ancestors. For not only is the decision of all facts within the power of a jury, but in this State it is exclusively their province to decide them, uninfluenced by the opinion of the judge upon the weight of the evidence, or its sufficiency to prove any fact in dispute. To the jury any argument may be urged impugning, or enforcing deductions of one fact from another proved, or from the defect of full proof of either the one fact or the other; and the opinions of men of able and practised minds may properly be laid before them in argument, as likely to influence their judgment by the force of the reasoning which led to those opinions, or by the authority of the opinions themselves, coming from such sources. But it is impossible to say, that such a tribunal is bound as to a conclusion of fact, by the precedent set by another tribunal for the decision of facts, whether consisting of a single judge, or of the numerous judges who compose a jury. There is no *law* to such a body but its conclusions upon the evidence as to the fact sought.

Is there a principle to be found laid down anywhere in the common law, as a positive precept, that *it is necessary* to the validity of the will of a man, written in his last illness, and when very weak from disease, by one who takes a large legacy under it, and was the confidential friend and adviser of the alleged testator, that those who offer the will should distinctly prove, besides the testable capacity of the maker, and the due formal execution of the instrument, the further facts, by distinct evidence, that the maker knew and approved of the contents of the instrument? If there be such a proposition, it has escaped our researches among the treasures of the common law. It is the principle of that code, that a paper obtained by duress or undue influence, or by deception, and without the free consent of the maker, given upon a knowledge of its provisions, is not a will. But that the want of such knowledge and consent are legal conclusions from evidence that the supposed testator was worn down by disease, and that the writer of the paper derives a large benefit under it, is nowhere found; nor that the like conclusion is absolutely to be drawn from those facts, with the additional one, that the writer was or was not a stranger or a confidential friend of the testator. After proof of capacity and execution, the common law lays down no rule upon the subject; but submits the general question to the jury for a decision, according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper, and assent thereto — under the comprehensive inquiry, whether a fraud has been practised. Where the testator's situation is such as to render the perpetration of a fraud easily practicable, the jury may say, they are not satisfied one was not practised, and thence infer its existence, unless the contrary be clearly shown. It is in the power of the jury, and may,

as reasonable men, be their duty, for fear of fraudulent practices, and in prevention of them, to find a fraud, or to give a verdict such as they would if they had found a fraud, where there is a defect of proof to negative it. It is upon that principle, that ecclesiastical judges regulate their judgments, as we understand them. But those are conclusions of fact, arising from evidence given or withheld. A *defect of proof*, unless it be a *total* defect, is for the consideration of the jury, wherever the law requires the intervention of a jury. The ecclesiastical judge can say, a case is not established, because it is reasonable to require in the particular case full proof, and to such and such points the proof is not full. So may a jury. But a judge, under our system of jurisprudence, cannot determine, when *prima facie* proof is offered, that the case fails, because further proof is not given. That the will was written by a legatee — that he stood in the relation of kindred, friend, or agent to the party, do not, of themselves, prove that the testator did not know or assent to the dispositions. They raise a suspicion of imposition, and make it reasonable to call for explanations. Such explanations may be given, as acknowledged in these very instructions, by evidence of the actual reading of the will by or to the testator, or by proving its conformity to the instructions given for it. There are other circumstances equally satisfactory; such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be prompted by natural affection to make. The intimacy of the relation between the writer and the testator may be, and is even less suspicious, than if they were strangers; upon the supposition that each draftsman writes himself heir. These considerations must satisfy the mind, that upon such a subject, the law cannot lay down as a test, that a will is, or is not, valid, when executed under any one or more of the particular circumstances mentioned; but necessarily refers the facts upon which its validity legally depends, to the decision of the jury, under evidence as to all the circumstances attending its preparation or execution, the condition, mental and physical, of the testator, the contents of the instrument, and the benefits provided in it for those actively concerned either in the preparation or execution. Evidence to each of these points may have an important bearing upon the just conclusions to be formed of the testator's capacity, and of the advantages that may have been taken of his weakness or confidence; and a jury may justly be alarmed at the danger of exposing testators to importunities and imposition, which would follow from establishing papers to be wills, when obtained *in extremis*, and under suspicious circumstances, unless those suspicions be removed by affirmative and plenary evidence, that the testator comprehended the dispositions made for him, and fully and freely sanctioned them. But like other questions of actual intention; of the state of the mind; of influence; knowledge or ignorance of one person, and of integrity

or dishonesty and fraud of another; this question is one of fact, to be decided by the jury upon evidence; which, in the opinion of the judge, is competent, as tending to establish any of those facts. Its tendency, it is the province of the judge to explain, by stating what conclusions may be drawn from it; but whether it establishes a fact, or whether a conclusion deducible from it, is or is not rebutted by other evidence, is the province of the jury to say.

That the rules of the ecclesiastical courts, although most sensible deductions of facts, are not parts of the law of this country, but only of the law of those courts, we deduce, not only from the manner in which the judges in those tribunals speak upon this question, but from the nature of the subject itself. But furthermore, the questions which arise before the ecclesiastical courts upon the probate of testaments, arise also in the courts of common law, in ejectments on devises, or on issues out of chancery, to try the validity of the will. Yet none of the principles on which the Ordinary makes deductions from evidence given or withheld, have been incorporated into the common law, so as to be laid down to the jury, as conclusions drawn from them. The evidence is submitted to them, that they may draw their own conclusion. For this very reason, the chancellor will not determine the validity of the will, but always sends it to an issue, *devisavit vel non;* and upon that issue and in ejectment, the verdict is frequently at variance with the judgment of the ecclesiastical judge on the same instrument, offered in his court as a testament.

For these reasons, we think there was error in stating it as a proposition of law, that the evidence supposed was necessary to the validity of the paper as a will. It should have been left to the jury to say, whether they thought, from the evidence given, that the presumption from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed; by its contents, and by the circumstances relied on by the defendant; or was confirmed by its contents and by the evidence to the testator's knowledge of them, and other circumstances offered on the other side. The case must therefore be submitted again to the jury.

Per curiam. *Judgment reversed.*[1]

[1] Compare *Will of Everett*, 153 N. C. 83.

That the scrivener is a beneficiary does not create a presumption that the will was procured by fraud or coercion. *Carter* v. *Dixon*, 69 Ga. 82; *Woodson* v. *Holmes*, 117 Ga. 19 (see *Hughes* v. *Meredith*, 24 Ga. 325); *O'Brien, Appellant*, 100 Me. 156, 168; *Cramer* v. *Crumbaugh*, 3 Md. 491; *Stirling* v. *Stirling*, 64 Md. 138; *Patten* v. *Silley*, 67 N. H. 520 (see *Edgerly* v. *Edgerly*, 73 N. H. 407); *Post* v. *Mason*, 91 N. Y. 539; *Riddell* v. *Johnson*, 26 Gratt. 152; *Barry* v. *Butlin*, 2 Moore P. C. 480; *Durling* v. *Loveland*, 2 Curt. Eccl. 225. See, however, *Hill* v. *Barge*, 12 Ala. 687; *Keeble v. Underwood*, 69 South. (Ala.) 473; *Estate of Packer*, 161 Cal. 525; *Duffield* v. *Robeson*, 2 Harr. 375; *England* v. *Fawbush*, 204 Ill. 384; *Bush* v. *Delano*, 113 Mich. 321; *Yardley*

B. Mistake.

ANONYMOUS.

Godb. 131, pl. 149. 1587.

It was holden by Anderson, C. J., that if one deviseth lands to the heirs of I. S. and the clerk writes it to I. S. and his heirs, that the same may be holpen by averment, because the intent of the devisor is written, and more; and it shall be nought for that which is against his intent, and against his will, and good for the residue. But if a devise be to I. S. and his heirs, and it is written but to the heirs of I. S. there an averment shall not make it good to I. S. because it is not in writing, which the Statute requires; and so an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.

MITCHELL ET AL. *v.* GARD ET AL.

3 Sw. & Tr. 75. 1862.

Sir C. Cresswell gave the following judgment:[1] In this case the defendants propounded a will alleged to have been made by Mary Gregory, widow. The plaintiffs pleaded — first, that the will was not duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; thirdly, that the paper-writing propounded was not the will of the deceased; fourthly, that the will was obtained by the undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before Byles, J., when the jury found, first, that the will was duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows: The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly, The son, in his haste, omitted the name

v. *Cuthbertson*, 108 Pa. 395; *Blume* v. *Hartman*, 115 Pa. 32; *Patton* v. *Allison*, 7 Humph. 320; *Tresidder's Estate*, 70 Wash. 15. Compare 15 Am. & Eng. Ann. Cas. 551 note; 28 L. R. A. N. S. 270 note; Georgia, Code (1914), § 3850.

[1] The opinion only is here given.

of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs on the third issue, giving to the defendants leave to move to enter it in their favor. A rule *nisi* for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of *Barry* v. *Butlin*, 2 Moo. P. C. 480; and *Mitchell* v. *Thomas*, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding, which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her will, because she forgot at the time that she had desired other legacies to be given, which were not inserted. Before the Statute 1 Vict. *c.* 26, many wills were brought under the consideration of the Prerogative Court, when it appeared that they did not contain all that the testator intended The cases

on the subject may be divided into two classes: one, where there was on the face of the will, as executed, some ambiguity or incongruity which indicated that something must have been omitted by mistake, and in them evidence was received of the testator's intention, and the omission supplied. The other class was where there was nothing on the face of the will to indicate that a mistake had been made, and the principle of law applicable to them was very clearly stated by Sir John Nicholl in *Bayldon* v. *Bayldon*, 3 Add. 232. He says: "Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error to account for this in the body of the will, extrinsic evidence of the testator having meant other than the will expresses is inadmissible, as the court after and notwithstanding such evidence would still be bound to pronounce for the will." And again, in *Shadbolt* v. *Waugh*, 3 Hagg. 573, the same learned judge, with reference to an alleged omission, said, "It may be possible that the non-insertion escaped his observation when the will was read over, but that is not sufficient."

The omission of the legacies therefore did not prevent the will propounded from being the will of the deceased. There is nothing to show that at the time when it was executed she believed it to be other than it really was; as far as this question is concerned, I think it makes no difference whether the legacies were omitted by accident or intentionally, nor can it make any difference that Gard remembered the legacies, and knew that she had forgotten them. But also the will was executed by her intending that it should be her will; if her execution of it had been obtained by fraud, the case would be different. The knowledge of Gard may raise a suspicion against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing I am of opinion that the writing propounded was the will of the testatrix and that the rule for entering a verdict for the defendants on the third issue must be made absolute.[1]

BROWN *v.* SELWIN and contra.

Cas. temp. Talb. 240. 1734.

JOHN BROWN, on the 23d of June, 1732, made his will, and thereby bequeathed to the plaintiff a legacy of £500 and all his plate; to the defendant he gave all his leasehold messuages; and after several other legacies and bequests, as well as devising some freehold and

[1] See *Comstock* v. *Hadlyme*, 8 Conn. 254, 265.

copyhold lands, he devised as follows: "and as for the rest, residue and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways entitled to, which I have not herein and hereby devised, given, &c., I give and bequeath the same, and every part thereof, and all my right, title and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators and assigns, as tenants in common, and not as joint tenants;" and afterwards appointed the plaintiff and defendant his executors, and soon after died; and the plaintiff and defendant proved the will. The defendant was at the time of the testator's death indebted to the testator in £3000 principal money, besides interest, and for securing thereof had given a bond to the testator, dated the 20th of June, 1732, in £6000 penalty; the bill was brought that the defendant might account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said £3000 and interest; and the cross bill was to have the bond delivered to be cancelled.

It appeared by the answer of the defendant in the original cause, and by the proofs in both causes, that the testator designed to give this money to the defendant; and gave one Viner, the attorney concerned in drawing the will, instructions in writing accordingly; but Viner refused to make mention of it in the will, insisting that the bond would be extinguished and released of course by Mr. Selwin's being appointed executor; but the testator appearing dissatisfied with Viner's opinion, a case was stated for counsel's opinion, who confirmed what Viner said: in confidence of which the testator signed and published his will, with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

LORD CHANCELLOR. [LORD TALBOT.] The question is, whether £3000 which was due to the testator from Mr. Selwin, shall pass to Mr. Selwin by his being made executor; or, whether it passed by the devise of the residue to the two executors. The written instructions for drawing the will directs the £3000 all to Mr. Selwin. The attorney who was to draw the will says it was the testator's intention it should go so; but that he, apprehending that making the obligor executor was an extinguishment of the debt, hindered it from being particularly mentioned. It was never doubted but a debt due from an executor to a testator shall be assets in the executor's hands to pay debts; for, if the testator had expressly given it away, even that could not have screened it from debts: so the testator may give a legacy out of a debt due to him, as in the case in Yelv. 160, *Flud* v. *Rumsey*, which authority is right: the implied gift, by making the debtor executor, may be controlled by an express gift, or by a devise of all his debts.

It hath been questioned whether such a debt be assets to pay legacies in general; but that not being the present case, it is not necessary to be determined: I am at present inclined to think it may; but shall not bind myself by giving my opinion till the case happens. If this be considered upon the will, without the parol evidence, it will appear clearly from the general words of devising the residue, *i. e., all his real and personal estate which he had not thereby before given to the residuary legatees;* that this debt, which at that time was part of the personal estate, falls within the description: the testator was entitled to this debt when he made his will, and at the time of his death; he had not before disposed of it, nor had he appointed Mr. Selwin executor. A devise of the residue after payment of debts and legacies plainly comprehends this debt; and the only doubt is with regard to Mr. Viner's evidence, who wrote the will. I privately think that it was intended the £3000 should go to Mr. Selwin. Privately I think so; but I am not at liberty, by private opinion, to make a construction against the plain words of a will. None of the cases where parol evidence has been admitted have gone so far as the present case; the farthest they go is to rebut an equity or resulting trust; the parol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will, as in the present case. It is better to suffer a particular mischief than a general inconvenience, and so reversed the decree, and ordered Mr. Selwin to account with the plaintiff Brown for the said £3000, but no costs.

This was upon an appeal from the Rolls.

This cause, the 26th of March, 1735, came before the House of Lords upon an appeal, and the Lord Chancellor's decree was affirmed: and the Lords would not allow the parol evidence to be read, nor even the respondent's answer as to these matters.[1]

NEWBURGH *v.* NEWBURGH.

5 Mad. 364. 1820.

THE late Earl of Newburgh, having estates in the counties of Sussex, Gloucester, and elsewhere, gave instructions to his solicitor to prepare a will, which *inter alia* was to give to his wife, the Countess Dowager of Newburgh, an estate for life in his estates in the counties of Sussex and Gloucester. The solicitor prepared a will in writing accordingly, and the same was afterwards laid before an eminent conveyancer to settle. By some accident, the word "Gloucester" was struck out by the conveyancer, and the person who made the

[1] See *Chappel* v. *Avery*, 6 Conn. 31; *Iddings* v. *Iddings*, 7 S & R. 111; *Collins* v. *Elston*, [1893] P. 1.

fair copy of the will, changed the word "counties" into "county," and the will, as fairly copied, omitted therefore altogether the estate for life to the Countess Dowager, in the county of Gloucester.

At the time Lord Newburgh executed the will, the solicitor who attended the execution had with him the abstract of the will as originally prepared, and the will was not itself read, but this abstract, which represented that a life estate was given to Lady Newburgh, as well in Gloucester as in Sussex; and Lord Newburgh executed the will, believing that it followed the abstract.

The first bill was filed for the execution of the trusts of the will as they actually appeared upon the face of the will. The second bill was by the Countess Dowager of Newburgh, stating the omission of her life estate in Gloucester, and praying that the mistake in that respect might be rectified, and that the trusts of the will might be executed with such correction.

The first question was, whether the evidence on the part of the Countess Dowager of Newburgh could be received for the purpose of correcting the mistake?

The Vice-Chancellor [Sir John Leach] refused the evidence; because, admitting it to be clearly made out that the mistake existed, this court had no authority to correct the will according to the intention. The will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the court could not for that reason set up the intention of the testator, which, by mistake, he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a devisor failed to comply with the Statute by mistake or accident, and to operate this repeal, by admitting parol evidence of the intention of the devisor, which it was the very object of the Statute to avoid. — That this case bore no analogy to cases where the devisee or heir prevented another gift in the will, by undertaking to perform it. There, the Statute was in no manner broken in upon; but this court, in respect of the fraud attempted, fastened that trust upon the estate which in equity and conscience attached upon it. — That admitting that voluntary conveyances might be corrected upon the principle, that as between volunteers this court would not permit a claim proceeding upon mistake, as to which two cases were cited; yet this principle had no application to the case of wills, for the difficulty was not that the will was a voluntary instrument, but that there could be no will without the forms of the Statute of Frauds, and the disappointed intention had not those forms. That if any party asked the same, he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. No such

issue was asked; and the case was sent, as to several questions of legal construction, to the Court of King's Bench.

The heir here contended that the omission of Lady N.'s life estate had made the subsequent limitations void as too remote; and it was immaterial to him, if he was right in this point, to try the fact of *devisavit vel non* as to the Gloucester estate. If otherwise, he would have avoided the will as to this estate upon the fact; because a gift immediate is not an execution of the intention to give after a prior life estate, and the omission of the life estate of Lady N. must therefore have defeated the whole devise as to the Gloucester estate.

I was not present at the argument of the foregoing points, but am informed that, as to this last point, *Mr. Bell* cited a case, not in print, upon the authority of Lord Chief Baron Richards, in which it was considered that Lord Eldon had sent it to a jury to try upon the same description of facts, what was the will of the testator; but whether any such trial had ever taken place was not known.

Mr. Sugden cited *Towers* v. *Moor*, 2 Vernon, 98, in which the same doctrine had been held, as to the Statute of Frauds, as was expressed by the Vice-Chancellor.

The case was afterwards re-heard before the Vice-Chancellor, and it was then suggested, as the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had first written, and afterwards struck through with a pen, but had been copied by mistake in the fair will; and it was contended there ought, therefore, to be an issue to try whether those words, so introduced by mistake, were part of the will.

The VICE-CHANCELLOR thought that if such a case had been originally made, they would have been entitled to such an issue; but that such case being in direct opposition to the allegations upon the record, he could not entertain it.[1]

[1] "In *Newburgh* v. *Newburgh*, the conveyancer, in settling the will of Lord Newburgh, had struck out by mistake the word 'Gloucester,' in a devise to the wife of the testator's estates in the counties of Sussex and Gloucester, and the word 'counties' was then altered by the copying clerk into 'county;' it was held both by Leach, V. C., and Lord Eldon, C., that parol evidence was inadmissible to prove the mistake. Upon an appeal to the House of Lords the judges were unanimous that the parol evidence could not be received, but the case was ultimately decided by the House upon the true construction of what still appeared on the face of the will. Upon the question of parol evidence I cited for the respondent *Towers* v. *Moor*, 2 Vern. 98; *Seymour* v. *Rapier*, Bunb. 28; *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; 7 T. Rep. 138; *Kelly* v. *Powlett*, Ambl. 605, 1 Bro. C. C. 476; *Doe* v. *Bland*, 11 East, 441; *Harwood* v. *Wallis*, 2 Ves. 195; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 477; *Brown* v. *Selwin*, For. 240; *Stratton* v. *Best*, 1 Ves. Jun. 285.

"The Vice-Chancellor appears to have thought that the omission of the word 'Gloucester' in the particular devise would avoid the whole will as to Gloucester, although in other passages in the will the estates were regularly devised according to the testator's intention, for although he held that he could not supply the word omitted, yet he said that the will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate. He added, that if any party asked the same he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. This the heir at law declined, because upon the will as it stood, *prima facie* the Gloucester estate was omitted in the devise to Lady Newburgh for life, with many remainders over, including limitations to unborn children in strict settlement, and it was not until failure of all these limitations that there was in express words a devise over of the Gloucester with the other estates, so that the devise over appeared to be too remote and therefore void. Of course Lady Newburgh sought no such issue, because she wanted an actual devise to her to support her claim. But the Vice-Chancellor in offering such an issue must have been of opinion that the omission of the word 'Gloucester' in the particular devise would render the whole will void as to the Gloucester estate. This, of course, could not be maintained, because, although the will did not contain all that the testator intended as to this estate, it contained in the actual devises of it nothing but what he did intend. And in the result the omission was supplied by construction, and the will was supported just as if there had been no mistake." — *Sugden, Law of Prop.* 206, 207.

"In the course of the argument in the House of Lords of the case of *Newburgh* v. *Newburgh*, Mr. Heald, for the appellant, was asked by Lord Eldon, C., whether there was any case in which an addition had been made to a will. *Hippisley* v. *Horner* was quoted. The Lord Chancellor said, 'I have known cases in which matter has been struck out of a will improperly inserted in it. If you insert a clause in a will, how are you after his death to have that attested by three witnesses?' Mr. Heald observed that the House would only be required to strike out a clause. Lord Chancellor: 'The cases I allude to were all cases in which it was struck out on the ground of fraud.' In a further part of the argument the Lord Chancellor asked, 'Are you to direct the judge what evidence he is to receive? *Hippisley* v. *Horner* is not worth twopence' (this expression I wrote down at the time it was uttered).

"In the above case of *Newburgh* v. *Newburgh*, Lady Newburgh's cross bill was filed in order to have the word 'Gloucester' supplied, by parol evidence of the mistake. That having failed in the court below, the counsel then discovered that by the *omission* altogether of two lines introduced by Mr. Butler (which were intended to contain an enumeration of all the estates in the term of 2,000 years, but which omitted 'Gloucester,') the will would convey all the estates to Lady Newburgh, according to the intention. But the Vice-Chancellor held that the frame of the bill was in direct opposition to that view of the case. If this view had originally occurred to Lady Newburgh's counsel, and the bill had been adapted to it, evidence would have been tendered to establish the mistake. But this is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, although inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation, made through carelessness or ignorance, could be corrected by striking out the words improperly introduced." — *Id.*, 196, 197.

See *Miller* v. *Travers*, 8 Bing. 244, 254, 255.

Compare a loose practice in the ecclesiastical courts. *Fawcett* v. *Jones*, 3 Phillim. 434, 485–487; *Blackwood* v. *Damer*, 3 Phillim. 458 n.; *Castell* v. *Tagg*, 1 Curt. Eccl. 298.

STANLEY *v.* STANLEY.

2 J. & H. 491. 1862.

BILL filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying that issues might be directed whether certain words were part of the will.[1]

Thomas Assheton Smith, the husband of the testatrix, died in 1858, seised in fee of real estate of great value in Wales, of a house at Tedworth in the county of Hants and adjoining property, partly in the same county, and partly in the county of Wilts. He devised all his real estate to the testatrix, who was his widow. She died in 1859, leaving a will which contained the following clause: —

"I give and devise my mansion-house at Tedworth in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments *in the county of Hants* devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of £50 per annum to be payable to Atwell, the valet of my late husband, during his life as hereinafter mentioned), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by any will at the time of my death (all which hereditaments *in the county of Hants* are hereinafter described or referred to as my Tedworth estate) to the uses and subject to, with, and under the provisos, powers, and devises hereinafter contained."

The bill contained, among other allegations, the following: —

"In giving instructions for the devise of her Tedworth estate, or of the manors, farms, lands, tenements, and hereditaments which in the said will are described as devised to her by the will of her late husband, subject to the amounts charged thereon by such will, the said testatrix did not mention or allude to the county of Hants, and the reference to the said county in the devise was introduced by mistake and without her instructions; and in particular the words *in the county of Hants* as they appear in [certain specified parts of the will, being the portions hereinbefore printed in italics] form no part of the will of the said testatrix."

The bill prayed that a proper issue or proper issues *devisavit vel non*, might be directed as to the said devise, and in particular whether the words *in the county of Hants*, in the places before mentioned, did or did not form part of the will of the said testatrix; and that it might be declared, that, according to the true construction of the will, the whole of the freehold manors and hereditaments, as well in

[1] Only that part of the case and opinion which relates to the prayer for issues is given; and a short statement, which is taken from 4 Gray, Cas. on Prop. (2d ed.), p. 72, is substituted for that in the report.

Wilts as in Hants, forming part of the Tedworth estate, were well devised, and were subject to the limitations contained in the will in respect of the hereditaments called "my Tedworth estate."

Evidence was gone into as to the nature and circumstances of the property and of its acquisition, and evidence was also tendered to the effect that the restrictive words "in the county of Hants" formed no part of the instructions, but were introduced by the solicitor under a mistaken impression that the whole estate was in that county.

VICE-CHANCELLOR SIR W. PAGE WOOD. This is a bill filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying for an issue *devisavit vel non* to ascertain whether certain words formed part of the will of the testatrix.

On the latter point I have felt no hesitation from the first. It is clearly impossible to grant any such issue as the plaintiff asks.

Authorities were cited; among others, *Hippesley* v. *Homer* [T. & R. 48 *n.*], and *Newburgh* v. *Newburgh*, from which it appears that in certain cases the court will direct an issue whether particular words found in the instrument formed part of a testator's will. For the present I will put aside all cases of fraud, and refer only to those where the object has been to strike out some passage from a will on the ground of mistake. In *Powell* v. *Mouchett* [6 Mad. 216], Sir J. Leach laid it down, that it was impossible to have an issue whether a clause was introduced by mistake; but that an issue might be directed whether a particular passage was really a portion of the will, putting as an illustration the case of a manifest interpolation. An issue, for the purpose of ascertaining whether certain words were in the will at the time of its execution, would be very proper. In the present case there is no dispute that the words which the plaintiff desires to strike out were there when the will was executed, and the issue would only be to ascertain whether the solicitor who prepared the will introduced them by mistake. There is no authority for an issue under such circumstances; and, on the other hand, there are some observations of Chief Justice Tindal in *Miller* v. *Travers* [8 Bing. 244], which are extremely pertinent, and, indeed, unanswerable. Referring to a proposal to introduce new words by evidence, the Chief Justice says, "If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to introduce new matter of devise or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended by the Statute of Frauds would be entirely destroyed and the Statute itself virtually repealed."

If property were devised to A. B. for life, an issue might be asked for the purpose of striking out the words "for life," and converting the interest into a fee simple. This would not be more absurd than striking out restrictive words for the purpose of enlarging the subject-matter of a devise.

[The learned judge then proceeded to the question of construction. This part of the case is omitted. — ED.]

GUARDHOUSE AND OTHERS *v.* BLACKBURN AND ANOTHER.

L. R. 1 P. & D. 109. 1866.

THE defendants in this case were the executors under the will and codicil of Mrs. Hannah Jameson, late of Netherton, in Cumberland, who died on the 29th of August, 1863. The plaintiffs were the residuary legatees named in her will. The will was dated the 30th of May, 1851, and the codicil the 13th of April, 1852, and both were proved in common form by the defendants, in October, 1863. The probate had since been called in by the plaintiffs, and the will and codicil were propounded by the defendants in the ordinary declaration.

By the will the testatrix disposed of three different estates, called Folds, Scales, and Stainton; the estate of Scales she charged with legacies to the amount of £500, and that of Stainton with eight legacies of the amount of £100 each. She duly executed a codicil to her will in the following terms: —

"This is a codicil to the will of me Hannah Jameson, of, &c., which will bears date the 30th day of May, 1851. I revoke the bequest of £100 therein made to my nephew, Edward Blackburn, and in lieu thereof I give him £200. I give and bequeath the legacy or sum of six hundred pounds, equally, unto, between, and amongst the therein named Samuel Jameson, John Jameson, Dorothy Smith, Margaret Armstrong, Jane Jameson, and Mary Ann Jameson; the said Jane Jameson and Mary Ann Jameson taking one-fifth share only, upon the same conditions, and under the same limitations in all respects as I have in my said will devised my estate of Folds in their favor. I release and discharge my said estate from the payment of the legacies therein given to my executors, and I direct all the legacies *therein and* herein given (and not revoked) to be paid out of my personal estate. In all other respects I ratify my said will. In witness whereof, I have hereunto set my hand, this 13th day of April, 1852. Hannah Jameson."

The plaintiffs admitted the due execution of the will and codicil, and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed

the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate in lieu of; and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of £500, and of the estate of Stainton of the payment of legacies to the amount of £800, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased.

William Carrick said in examination: he took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1,300; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Cur. adv. vult.

Sir J. P. Wilde. The plaintiffs have cited the defendants, to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof.

The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will.

The ground upon which the court is asked to expunge them, is that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proved to be the fact (if the evidence is admissible and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions.

It is not, however, denied that the codicil, as it stands, was read to the testatrix, and duly executed by her. Questions of vital importance to the integrity of the present testamentary system are here raised. It devolves on the court to endeavor to disentangle the line of demarcation between what the law allows and what it refuses, to the natural desire of giving effect to what are supposed to be the testator's wishes, and to set clear the limits within which any script duly executed can be shorn of its full testamentary effect, by reference to any other source of information. I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the ecclesiastical courts on this head. Under that law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former.

Hence the class of cases in which those courts have gone farthest in violating the integrity of an executed paper. They will be found collected in the argument of Dr. Addams, in the case of *Fawcett* v. *Jones and others*, 3 Phill. at p. 450, a case remarkable for the evident hesitation and reluctance with which Sir John Nicoll accepted the full results of the principle involved in the previous decisions. His judicial foresight enabled him to turn aside from the brink to which these decisions were urging him; and he refused to pass over a line, which, once passed, would have set all wills at the mercy of parol evidence, and "introduced (as he said) a most alarming insecurity into the testamentary dispositions of all personal property." The most prominent of these cases was *Blackwood* v. *Damer*, 3 Phill. 458. It was appealed to the delegates, who affirmed the decision of the court below, and permitted a will which had been duly signed with full knowledge of its contents, and which contained no residuary clause, to be supplemented by instructions in the testator's own writing, giving the residue to his daughter, granting probate of the will, and that part of the instructions as together constituting the will, and this on the ground of mistake, proved by the attorney and corroborated by the written paper of instructions. This case was much relied on in argument here. But the words of the Wills Act, "No will shall be valid" unless executed in a certain manner, obviously exclude the probate of unexecuted

instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. It is conceded ground in the argument, that this court cannot any longer admit to probate any paper, whatever its form, which is not executed according to the Statute. This class of cases, therefore, is of no authority in reference to wills made since 1838, and, in deciding the present case, may be laid aside. But then comes the question, if the court cannot now, as it could before the Statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. Nothing is less satisfactory than a perusal of the cases decided in the Prerogative Court under this head. In some cases, parol evidence was excluded, and in some admitted, without any sufficient difference in principle to sustain the distinction. I venture to think that the Ecclesiastical Courts created a difficulty (perpetually recurring) for themselves, when they attempted to adopt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts, and pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing. In the attempt to escape these rules, while keeping up the semblance of adhering to them, Sir John Nicoll, in the case above quoted, speaks of "an ambiguity in the *factum*" of the instrument, and makes that the ground of admitting parol evidence. But what, it may be asked, are all controversies as to the instrument, which should be pronounced to contain the testamentary intentions of the deceased, and to be his will, but cases in which some ambiguity exists as to the *factum* of such instrument as a complete will? The truth is, that the rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect. Nor, indeed, are

these rules pressed in the courts either of law or equity beyond thi mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see *Pym* v. *Campbell*, 6 E. & B. 370. Or if (going farther still) some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see the case of *Wake* v. *Harrop*, 6 H. & N. 768, and the paragraph there cited from Story's Equity Jurisprudence, at p. 772. On this head, then, the court may safely adopt the language of Mr. Justice Williams on Executors, vol. i. p. 313 (5th ed.): "In a court of construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited, for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

I may quit this branch of the subject with the observation that the foregoing remarks have a wider application to wills made before the Statute than since, for the Statute has much narrowed the field of inquiry; the principle, however, is the same. It is hardly necessary to add, that where the Court of Probate has (as is often the case) to construe one admitted testamentary paper, for the purpose of ascertaining another, it acts as a court of construction, and is guided by the same rules. Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs to what extent is it still open to the court since the Statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? A more important inquiry could hardly arise. For you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration, the following propositions commend themselves to the court as rules which, since the Statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend

the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. The first and second of these propositions are amply established by the case of *Barry* v. *Butlin*, 2 Moo. P. C. 480, and others of that class in the Privy Council. The third was also well approved law in the Ecclesiastical Courts, for there must be an *animus testandi* to constitute a paper testamentary. The fourth requires no comment, and the last is justified by the case of *Allen* v. *M'Pherson*, 1 H. of L. Cas. 191. It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the Statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the Statute would thus perish at the hands of the court. I have thus endeavored to place the use of parol evidence in these matters on its true ground. The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade — more certain, more reliable — than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If a statute require that a thing should be in writing and signed, in order to its validity, it precludes the court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be added as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testator before the execution thereof, she duly executed the same, and the court conceives it to be beyond its

functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.[1]

MORRELL AND OTHERS *v.* MORRELL AND OTHERS.

7 P. D. 68. 1882.

March 14. THE PRESIDENT.[2] The findings of the jury have disposed of the whole matter. It appears that the testator intended to leave all his shares in a particular company to his nephews, and gave instructions to that effect to his solicitor, who embodied them in writing and sent them to a conveyancing counsel in London to draw the will. In those instructions the solicitor spoke, as he had been directed by the testator to speak, of "all" the testator's shares; but, by some accident not accounted for, counsel introduced into the draft will the word "forty" before "shares." Though the solicitor saw this, it never attracted his attention, and he never realized the effect the word "forty" would have on the disposition of the shares made by the testator. The jury have arrived at the conclusion that what the solicitor said on this subject was correct — that he never informed the testator in any way that the word "forty" had been introduced; and it was proved, by other evidence than that of the solicitor himself, that the actual will as executed was not read over to the testator. The jury found that the testator never authorized the introduction of the word "forty" in the will, and never heard that it had been introduced, and that he executed the will in the belief that it carried out his instructions. In the case of *Harter* v. *Harter*, Law Rep. 3 P. & M. 11, 22, I held that the language of a will could not be changed where the testator had seen the words and adopted them; but in *Fulton* v. *Andrew*, Law Rep. 7 H. L. 448, where a residuary bequest was introduced into a will without the knowledge and authority of the testator, the clause containing that bequest was rejected. If so, the same principle may be applied to a single word, and therefore, on the ruling of the House of Lords, in *Fulton* v. *Andrew*, Law Rep. 7 H. L. 448, I hold that the words may be struck out which had been introduced without the authority of the testator.

The Court directed that the word "forty" be struck out of the four places in which it occurred in the will, and, by consent of the parties, directed that the costs be paid by the plaintiffs.[3]

[1] See *Harter* v. *Harter*, L. R. 3 P. & D. 11; *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

[2] The statement of facts and the charge to the jury are omitted.

[3] "When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will, there is no difficulty in pronouncing that the instrument is not his will.

And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that *In the Goods of Duane*, the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. 4 & 1 Vict. *c.* 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter* v. *Harter* has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it." — *Per* LORD BLACKBURN in *Rhodes* v. *Rhodes*, 7 App. Cas. 192, 198.

"When a testamentary instrument offered for probate is executed and attested as required by statute, and has not been revoked or cancelled, only three questions can arise: 1st. Was the testator, at the time of executing the instrument, of sound and disposing mind and memory, capable of understanding the nature of the act he was doing and the relation in which he stood to the objects of his bounty and to the persons to whom the law would have given his property if he had died intestate? 2d. Was the instrument executed under fraud or undue influence, by which his own intentions were controlled and supplanted by those of another person? 3d. Did he execute the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament? . . .

"In a court of probate, it may doubtless be shown by parol evidence that the alleged testator, at the time of signing the instrument, did not understand that it was a will, or intend that it should operate as such. *Swett* v. *Boardman*, 1 Mass. 258. *Osborn* v. *Cook*, 11 Cush. 532, 535. But if, being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms and solemnities which the statute makes essential to the validity of a testamentary disposition." — *Per* GRAY, J., in *Barker* v. *Comins*, 110 Mass. 477, 487–489.

See *O'Connell* v. *Dow*, 182 Mass. 541, 551; *Waite* v. *Frisbie*, 45 Minn. 361; *Bradford* v. *Blossom*, 207 Mo. 177; *Goods of Duane*, 2 Sw. & Tr. 590; *Goods of Oswald*, L. R. 3 P. & D. 162; *Goods of Gordon*, [1892] P. 228; *Goods of Moore*, [1892] P. 378; *Brisco* v. *Hamilton*, [1902] P. 234; *Vaughan* v. *Clerk*, 87 L. T. R. N. S. 144.

A paper, in form a will though not really intended as such, will not be admitted to probate, as when it is made to show in how short a form a will can be drawn, *Nichols* v. *Nichols*, 2 Phillim. 180; or to induce a third person to think a will has been made, *Fleming* v. *Morrison*, 187 Mass. 120; *Lister* v. *Smith*, 3 Sw. & Tr. 282 (but see *Kennedy's Estate*, 159 Mich. 548); or where one paper is signed by mistake for another, *Nelson* v. *McDonald*, 61 Hun 406; *Alter's Appeal*, 67 Pa. 341; *Goods of Hunt*, L. R. 3 P. & D. 250; *In re Meyer's Estate*, [1908] P. 353.

Compare *McAlister* v. *Butterfield*, 31 Ind. 25. See *Brown* v. *Avery*, 63 Fla. 355.

GIFFORD *v.* DYER, EXECUTOR.

2 R. I. 99. 1852.

THIS was an appeal from a decree of the Court of Probate of Little Compton, proving and approving the last will and testament of Abigail Irish. The will was dated December 4, 1850, and the testatrix died December 6, 1850. After several bequests of small sums to the children of Robin Gifford and to others, she gives and bequeaths the rest and residue of her property, one half to John Dyer, who was her brother-in-law, and the other half to her two nephews, Jesse and Alexander Dyer. Robin Gifford, the only child of the testatrix, was not mentioned in the will. It appeared in evidence, that at the date of the will, Robin Gifford had been absent from home, leaving a family, for a period of ten years, unheard from; that all the neighbors considered him dead, and that his estate had been administered upon as of a person deceased. The scrivener who drew the will, testified as follows: "After I had read the will to her, she asked if it would make any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years; she said, if it would make any difference she would put his name in, for they will break the will if they can. I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of to my knowledge. She was speaking of a home at Mr. Dyer's and said, what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." It appeared that the testatrix had resided with John Dyer for some time previous to her death.

GREENE, C. J., delivered the opinion of the court. It is very apparent in the present case, that the testatrix would have made the same will, had she known her son was living. She did not intend to give him anything, if living.

But if this were not apparent and she had made the will under a mistake as to the supposed death of her son, this could not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. *Campbell* v. *French*, 3 Vesey, 321.[1]

[1] See *In re Touscy's Will*, 69 N. Y. Supp. 846.

GOODS OF BUSHELL.

13 P. D. 7. 1887.

SAMUEL H. BUSHELL, late of Worcester Park, in the county of Surrey, died June 8, 1887, leaving a will duly executed dated November 27, 1885. The will was prepared by his solicitor from his instructions, which were read over to him and fully explained, and on November 26, 1885, he executed a draft, which was also read over to him. When the engrossment of the draft was brought to him next day, he asked whether it corresponded with the draft, and being assured that it did, he did not require it to be read over to him, but executed it without further examination. Among other bequests in the will was a legacy of £5000 to the "British" Royal Infirmary, but in the executed draft the bequest was to the "Bristol" Royal Infirmary, which it appeared from the affidavits expressed his real intention.

B. Deane, moved for probate with the substitution of the word "Bristol" for "British." There is no reported case exactly in point, but in *Morrell* v. *Morrell*, 7 P. D. 68, where there was a bequest of "all my '40' shares," the Court ordered the "40" to be struck out on the jury finding that the testator intended to bequeath all his shares, which were actually 400.

BUTT, J. I see no reason why the alteration should not be made: I will grant probate with the word "Bristol" inserted instead of the word "British," on the production of an affidavit that there is no such institution as the "British" Royal Infirmary.[1]

PATCH *v.* WHITE.

117 U. S. 210. 1886.

Ejectment. The question at issue was the construction of a will, the principal parts of which are set forth in the opinion of the court. The case was first argued November 12, 1885. The judgment below was affirmed by a divided court, November 26, 1885. On the 14th December this judgment was set aside, and a reargument was ordered, which was made January 13, 14, 1886, by the same counsel.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Ejectment for two undivided thirds of a lot of land in Washington City, known on the plats and ground plan of the city as lot No. 3, square 406, fronting 50 feet on E Street north: plea, not

[1] But see *Goods of Schott*, [1901] P. 190.

guilty. The plaintiff, John Patch, now plaintiff in error, claims the lot under Henry Walker, devisee of James Walker. The latter died seized of the lot in 1832, and by his last will, dated in September of that year, devised to Henry Walker as follows, to wit: "I bequeath and give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected, and appurtenances thereto belonging." The testator did not own lot number 6, in square 403, but did own lot number 3, in square 406, the lot in controversy; and the question in the cause is, whether the parol evidence offered and by the court provisionally received, was sufficient to control the description of the lot so as to make the will apply to lot number 3, in square 406. The judge at the trial held that it was not, and instructed the jury to find a verdict for the defendant. The court in General Term sustained this ruling and rendered judgment for the defendant; and that judgment is brought here by writ of error for review upon the bill of exceptions taken at the trial.

The testator, at the time of making his will, and at his death, had living a wife, Ann Sophia, an infant son, James, a mother, Dorcas Walker, three brothers, John, Lewis, and Henry (the latter being only eleven years old), and three sisters, Margaret Peck, Louisa Ballard, and Sarah McCallion, and no other near relations, and all of these are provided for in his will, if the change of description of the lot given to Henry is admissible; otherwise Henry is unprovided for, except in a residuary bequest of personal property in connection with others. The following are the material clauses of the will. After expressing the ordinary wishes and hopes with regard to the disposal of his body and a future life, the testator adds: "And touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner and form." He then gives and bequeaths to his wife one-third of all his personal estate, forever, and the use of one-third of his real estate for life, remainder to his infant son, James. He then proceeds: "I bequeath and give to my dear and affectionate mother, Dorcas Walker, forever, all of lot numbered seven, in square one hundred and six, as laid down on the plan of the City of Washington, together with all the improvements thereon erected and appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother, John Walker, forever, all of lot numbered six, in square one hundred and six, with the two-story brick house, back building, and all appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother, Lewis Walker, forever, lots twenty-three, twenty-four, and twenty-five, in square numbered one hundred and six, together with a two-story brick building, with a basement story back building, and all appurtenances thereto belonging and erected on one or more of said lots.

"I bequeath and give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

Then, after giving to his three sisters, and his infant son, respectively, other specific lots with houses thereon, he proceeds as follows:

"I also bequeath and give to my infant son, James Walker, forever, the balance of my real estate *believed to be and to consist in* lots numbered six, eight, and nine, with a house, part brick and part frame, erected on one of said lots, in square one hundred and sixteen; lots thirty-one, thirty-two, and thirty-three, in square numbered one hundred and forty, and a slaughter-house erected on one of said lots; lots numbered eight and eleven, in square numbered two hundred and fifty; and lot numbered twenty-eight, in square numbered one hundred and seven; and further, I bequeath and give to my infant son, James Walker, one thousand dollars, to be paid out of my personal estate, and applied at the discretion of his guardian hereinafter appointed, for the education of my son, James Walker." He then adds:

"The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister, Sarah McCallion, and my brothers, John, Lewis and Henry Walker."

It is clear from the will itself —

1. That the testator intended to dispose of all his estate.

2. That he believed he had disposed of it all in the clauses prior to the residuary clause, except the specific lots thereby given to his son.

3. That when he gave to his brother, Henry, lot number 6, in square 403, he believed he was giving him one of his own lots. On general principles, he would not have given him a lot which he did not own; and he expressly says, "touching worldly estate, wherewith it has pleased Almighty God to bless *me* in this life, I give, devise, and dispose of *the same* in the *following* manner."

4. That he intended to give a lot with improvements thereon erected.

Now, the parol evidence discloses the fact, that there was an evident misdescription of the lot intended to be devised. It shows, first, as before stated, that the testator, at the time of making his will, and at the time of his death, did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406; secondly, that the former lot had no improvements on it at all, and was located on Ninth Street, between I and K Streets, whilst the latter, which he did own was located on E Street, between Eighth and Ninth Streets, and had a dwelling house on it, and was occupied by the testator's tenants — a circumstance which precludes the idea that he could have overlooked it.

It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind, whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective.

It is to be borne in mind that all the other property of the testator, except this one house and lot, was disposed of to his other devisees, at least that was his belief as expressed in his will, and there is no evidence to the contrary; whilst this lot (though he believed he had disposed of it), was not disposed of at all, unless it was devised to his brother, Henry, by the clause in question. In view of all this, and placing ourselves in the situation of the testator at the time of making his will, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote, or dictated, the clause under consideration? What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot number 3, in square 406. Then is it not most clear that the words of the will, "lot numbered six, in square four hundred and three," contained a false description. The testator, evidently by mistake, put "three" for "six," and "six" for "three," a sort of mis-speech to which the human mind is perversely addicted. It is done every day even by painstaking people. Dr. Johnson, in the preface to his Dictionary, well says: "Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning." Not to allow the correction of such evident slips of attention, when there is evidence by which to correct it, would be to abrogate the old maxim of the law: "*Falsa demonstratio non nocet.*"

It is undoubtedly the general rule, that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is? Of course, the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made.

It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject: as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator. 1 Jarman on Wills, 370; Hawkins on Wills, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. 1 Jarman on Wills, 364, 365; 1 Roper on Legacies, 297, 4th ed.; 2 Williams on Executors, 988, 1032. Mr. Williams (afterwards Mr. Justice Williams) says: "Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified. . . . 1. By the context of the will; 2. To a certain extent by parol evidence. . . . A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator." pp. 988–989. Again he says, on page 1032: "Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstances, taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: As, for instance, the testator bequeaths his horse Criple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse; if, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name." See also Roper on Legacies, 297.

The rule is very distinctly laid down by Sir James Wigram, who

says: "A description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity, and, as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them." Wigram on Extrinsic Evidence, 53. Of course when the author speaks of the rejected words as being "inapplicable to any subject," he means inapplicable because the subject is not in existence, or does not belong to the testator.

The case of the *Roman Catholic Orphan Asylum* v. *Emmons*, 3 Bradford, 144, which arose before the Surrogate of New York, well illustrates the application of the rule. There a testatrix bequeathed *her* shares of the Mechanics' Bank stock to the Orphan Asylum. She had no bank stock except ten shares of the City Bank. Surrogate Bradford, in a learned opinion, held that the word "Mechanics" must be rejected as inapplicable to any property ever owned by the testatrix, and the rejection of this word left the bequest to operate upon any bank stock possessed by her, and so to pass the City Bank shares. See also a learned note of Chief Justice Redfield, 10 Am. Law Reg., N. S. 93, to the case of *Kurtz* v. *Hibner*, 55 Ill. 514, in which he strongly disapproves the decision in that case.

Chief Justice Marshall, in *Finlay* v. *King's Lessee*, 3 Pet. 346, 377, lays down the general rule that underlies all others. "The intent of the testator," says he, "is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence."

But it is not our intention to review or classify the decisions. They are legion. The intrinsic difficulty of stating the rule as applicable to all cases is such as to make it presumptuous in any one to attempt to chain it down and fix it in the form of a verbal definition. Sufficient appears from the authorities already quoted to show that, whilst no bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used, when applied to the circumstances by which he was surrounded, yet a careful study of that language and of those circumstances will generally disclose any inadvertency or mistake in the description

of persons or things, and the manner in which it should be corrected, without adding anything to the testator's language, and thereby making a different will from that left by him. We will only quote further, an observation of Chief Justice Thompson, of New York, in *Jackson* v. *Sill*, 11 Johns. 201, which is very pertinent to the present discussion. In that case the court rejected the extrinsic evidence offered to remove a supposed latent ambiguity in a will, for the very good reason that it appeared, on examination, that no ambiguity existed. But the Chief Justice justly said: "It is undoubtedly a correct rule in the construction of wills, to look at the whole will for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. But where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper." Of course, in the case of a latent ambiguity such repugnancy can only appear by means of the evidence which discloses the ambiguity.

In view of the principles announced in these authorities, the case under consideration does not require any enlargement of the rule ordinarily laid down, namely, the rule which requires in the will itself sufficient to identify the subject of the gift, after striking out the false description. The will, on its face, taking it altogether, with the clear implications of the context, and without the misleading words, "six" and "three," devises to the testator's brother, Henry, in substance as follows: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot number —, in square four hundred and —, together with the improvements thereon erected and appurtenances thereto belonging — being a lot which belongs to me, and not specifically devised to any other person in this my will." In view of what has already been said there cannot be a doubt of the identity of the lot thus devised. It is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words "six" and "three" from the description of the will, as not applicable (unless interchanged) to any lot which the testator owned; or instead of striking them out, supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question, that we have no hesitation in saying that it was lawfully devised to Henry Walker.

The judgment is reversed, and the cause remanded, with directions to award a new trial.[1]

[1] The dissenting opinion of MR. JUSTICE WOODS, with whom concurred MR. JUSTICE MATTHEWS, MR. JUSTICE GRAY, and MR. JUSTICE BLATCHFORD, is omitted.

See 4 Wigmore, Evidence, §§ 2476, 2477.

GOODS OF BOEHM.

[1891] P. 247. 1891.

MOTION for a grant of probate of a will with certain alterations.

The testator, Sir J. E. Boehm, R.A., died December 24, 1890, leaving a will duly executed bearing date December 12, 1889.

The instructions for the preparation of the will were given to Mr. Mills, an old friend, who conveyed them to the testator's solicitor, by whom they were laid before counsel to prepare a draft will.

From the affidavits of these gentlemen it appeared that by his instructions the testator directed that two sums of 10,000*l.* each, part of a specific sum of 24,000*l.* dealt with in the will, should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife, who was to have the life interest if she survived him. By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the word "Florence" altogether; so that there were two gifts of 10,000*l.* to Miss Georgiana Boehm, while Miss Florence Boehm was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will, together with an epitome of its provisions, were taken to the testator by Mr. Mills. The draft was never read over to him, but the epitome was. In the epitome the names "Georgiana" and "Florence" were accurately given, and the testator read it over and made corrections in it. The testator did not read the will over at the time of execution, and it was perfectly certain that his attention was not drawn to the mistake, which was only discovered after his death.

JEUNE, J. I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word Georgiana omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion; but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it. It is clear from the evidence that the testator intended to give 20,000*l.* in equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly expressed this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read or have read over to him the will, but did read what

professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word Georgiana was clearly inserted in the two places in question in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of *Morrell* v. *Morrell*, 7 P. D. 68, following *Fulton* v. *Andrew*, Law Rep. 7 H. L. 448, and the earlier authority of *In the Goods of Duane*, 2 S. & T. 590, mistake is to be regarded as a question of fact depending on the circumstances of each case, and there is now no difficulty, in circumstances such as those of the above cases, in striking out a clause, or a single word, if shewn to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in *Fulton* v. *Andrew*, Law Rep. 7 H. L. 448, in reference to the decisions in *Atter* v. *Atkinson*, Law Rep. 1 P. & D. 665, *Guardhouse* v. *Blackburn*, Law Rep. 1 P. & D. 109, and *Harter* v. *Harter*, Law Rep. 3 P. & D. 11, from a presumption of knowledge and approval arising from the reading of, or hearing read, a will by a competent testator, because here the evidence is that the testator, relying on the epitome, never read or heard the will read.

My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word Georgiana and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in *Morrell* v. *Morrell*, 7 P. D. 68, if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number, "four hundred," instead of "forty" — in fact, had answered the second question put to them differently from the way in which they did. The cases of *In the Goods of Bushell*, 13 P. D. 7, and *In the Goods of Huddleston*, 63 L. T. (N. S.) 255, refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee in *Rhodes* v. *Rhodes*, 7 App. Cas. 192, points to the difficulty of rejecting words where their rejection alters the sense of those which remain. But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike

out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

C. *Form.*

LEMAYNE *v.* STANLEY.

3 Lev. 1. 1691.

In ejectment upon *Not guilty*, and a special verdict, the case was: Stanley seised in fee writ his will with his own hand; beginning, "In the name of God, Amen, I John Stanley make this my last will and testament," and thereby devised the lands in question, and put to his seal, but did not subscribe his name, only had it subscribed by three witnesses in his presence; and all this was done after 29 Car. 2, against Frauds and Perjuries; and whether this was a good will to pass the lands, was the question. And after several arguments it was adjudged by the whole court, *sc.* North, Wyndham, Charlton, and Levinz, to be a good will; for being written by himself, and his name in the will, it is a sufficient signing within the Statute, which does not appoint where the will shall be signed, in the *top*, *bottom*, or *margin*, and therefore a *signing* in any part is sufficient. And *per* North, Wyndham, and Charlton, the putting of his seal had of itself been a sufficient *signing* within the Statute; for *signum* is no more than a *mark*, and sealing is a sufficient *mark* that this is his will: but Levinz doubted of this upon the case in Roll. 1 Abridgm. 245, § 25. Submission to an award *ita quod* it be made, *signed*, and delivered, the arbitrator makes an award, and delivers it, but does not *sign* it: Et per Cur'. It is not good;[1] but all agreeing upon the other reason, judgment was accordingly given for the defendant.[2]

[1] "It was said by Lord Chief Baron Parker, Baron Clive, and Baron Smythe, (*absente* Legg,) that what is said by North, Windham, and Charlton, in 3 Lev. 1, 'That putting a seal to a will is a sufficient signing within the Statute of Frauds and Perjuries,' is very strange doctrine; for that if it was so it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And the barons said if the same thing should come in question again, they should not hold that sealing a will only was a sufficient signing within the Statute." *Smith* v. *Evans*, 1 Wils. 313.

[2] See *Armstrong* v. *Armstrong*, 29 Ala. 538; *Kolowski* v. *Fausz*, 103 Ill. App. 528; *Hallowell* v. *Hallowell*, 88 Ind. 251; *Miles' Will*, 4 Dana, 1; *Meads* v. *Earle*, 205 Mass. 553; *Barnes* v. *Chase*, 208 Mass. 490; *Kohn's Estate*, 172 Mich. 342; *Armstrong* v. *Walton*, 105 Miss. 337; *Catlett* v. *Catlett*, 55 Mo. 330; *Phelan's Estate*, 82 N. J. Eq. 316; *Will of Bullivant*, 82 N. J. Eq. 340; *Booth* v. *Timoney*, 3 Dem. Sur. 416;

JENKINS *v.* GAISFORD ET AL.

3 Sw. & Tr. 93. 1863.

JOHN JENKINS, late of Botley Hall, in the county of Southampton, Esq., died on the 22d of November, 1862, leaving a will, duly executed on the 14th of April, 1862, whereby he appointed his sister, Jane Gaisford, and his brother, Henry Jenkins, executrix and executor. There were two codicils, dated respectively the 5th of November, 1862, and the 6th of November, 1862, and an affidavit made by Henry Atkins stated the manner in which they had been executed.

Henry Atkins deposed as follows: "That I have for one year and upwards during the lifetime of the said John Jenkins, and up to the time of his death on the 22d of November last, acted as amanuensis to the said John Jenkins, who had for a considerable past time much difficulty in writing or signing his name; that the said John Jenkins, some months previously to his death, had an engraving made of his usual signature in order that the same might be used to stamp or impress his signature to letters and other documents, and that in his presence I have been in the habit of affixing to letters and other documents and papers the name of the said John Jenkins by means of the said stamp or engraving; that I am one of the subscribing witnesses to the first codicil to the will of the said John Jenkins, now produced and shown to me, the said codicil being written at the foot of the said will, and bearing date the 5th of November, 1862; that the said codicil was executed by the said testator on the day of the date thereof by my affixing or impressing the signature of the said John Jenkins, in compliance with his express orders and direction, at the foot or end thereof by means of the said stamp or engraving as the same now appears thereon, in the presence of the said John Jenkins and of Ann Budd, the other subscribing witness thereto, both of us being present at the same time, and that the said testator, after his signature had been affixed to the said codicil as aforesaid, placed his hand on the said codicil and acknowledged the signature as his own, and the said codicil to be a codicil to his last will, and requested me to attest the same, and I and the said Ann Budd thereupon attested and subscribed the said codicil in the presence of the said testator and of each other." The deponent

Will of Booth, 127 N. Y. 109; *Peace* v. *Edwards*, 86 S. E. (N. C.) 807; *Lawson* v. *Dawson*, 21 Tex. Civ. App. 361; *Armendariz de Acosta* v. *Cadena*, 165 S. W. (Tex.) 555; *Waller* v. *Waller*, 1 Gratt. 454; *Ramsay* v. *Ramsay*, 13 Gratt. 664; *Warwick* v. *Warwick*, 86 Va. 596; *Adams* v. *Field*, 21 Vt. 256; *Young's Will*, 153 Wis. 337.

On signing at the "foot or end," see Stat. 7 W. IV & 1 Vict., c. 26, § 9 (1837); Stat. 15 & 16 Vict., c. 24 (1852); *Graham* v. *Edwards*, 162 Ky. 771; *Matter of Conway*, 124 N. Y. 455; *Matter of Andrews*, 162 N. Y. 1; *Matter of Field*, 204 N. Y. 448; *Sears* v. *Sears*, 77 Ohio St. 104, 119; *Morrow's Estate*, 204 Pa. 479; *Beaumont's Estate*, 216 Pa. 350; *Stinson's Estate*, 228 Pa. 475; *Taylor's Estate*, 230 Pa. 316; 1 Woerner, Am. Law of Adm. (2d ed.), § 39.

then gave a similar description of the manner in which the testator's signature had been stamped upon the second codicil.

SIR C. CRESSWELL refused to grant probate of the codicils on motion.

Henry Jenkins, the executor named in the will, thereupon propounded the will in a special declaration containing a statement of the above facts, and cited Mrs. Gaisford and Mrs. Thring, the sisters, and with himself the only next of kin, of the deceased. An appearance was given on behalf of Mrs. Gaisford, and a demurrer to the declaration filed and joinder in demurrer; but before the demurrer came on for argument Mrs. Gaisford died, and Mrs. Thring declined to take any steps in the matter.

Cur adv. vult.

SIR C. CRESSWELL. I am of opinion that the codicils were duly executed so as to comply with the 1 Vict. *c.* 26, § 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word "signed" in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.[1]

MILAM *v.* STANLEY.

33 Ky. Law Rep. 783. 1908.

Appeal from Logan Circuit Court.

Opinion of the court by JUDGE HOBSON, affirming.

W. R. Fletcher was convicted in the Logan Circuit Court of rape and sentenced to be hung. He appealed to this court, where the judgment was affirmed. He applied to the Governor for clemency and his application was denied. The date of his execution was fixed for February 15, 1907. On February 12, 1907, he wrote the following letter:

[1] See *Everhart* v. *Everhart*, 34 F. R. 82; *Bailey* v. *Bailey*, 35 Ala. 687; *Boone* v. *Boone*, 114 Ark. 69; *Ripol* v. *Morina*, 12 Rob. (La.) 552; *Succession of Bradford*, 124 La. 44; *Watson* v. *Pipes*, 32 Miss. 451; *Will of Pope*, 139 N. C. 484; *Estate of Knox*, 131 Pa. 220; *Pilcher* v. *Pilcher*, 117 Va. 356; *Goods of Redding*, 2 Rob. (Eccl.) 339; *Goods of Emerson*, 9 L. R. Ir. 443; 1915 D. L. R. A. N. S. 902 note; 5 Prob. Rep. Ann. 416 note.

"My Dear Loving Daughters:

"I guess my last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I think I am prepared to go and want to ask one thing of you all is to meet me in heaven. Jennie, Lula and Bettie and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven, and it does me good to know that God knows that I am not guilty. Jennie, tell John to see that my body is taken home and buried in our own graveyard, and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot, and I don't want you and her to ever have any trouble over it. Jennie, I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good. I hope to soon meet her in heaven. Jennie, Mary has got enough of my money to bury me, I guess. So this is from your loving father,

"W. R. Fletcher.

"To Jennie and Lula, may God bless you all, is my prayer.

"Yours,

"W. R. F."

He was executed on February 15, and afterwards the letter was offered for probate as his will. The appeal before us is prosecuted from the judgment of the circuit court admitting the paper to probate. It is insisted that the paper is not testamentary in character; that it only indicates an intention to make Jennie and Lula a deed to the house and lot, and that the deceased having died without executing this intention by making a deed, the paper can not be probated as a will.

In determining whether the paper is testamentary or not the court will look, not only at the language of the instrument, but at the situation of the maker and at his intention. W. R. Fletcher knew when he wrote this paper that he was to die on February 15. His last hope of life was gone, and knowing that he was to die on the fifteenth, he wrote this letter to his daughters. The letter shows on its face that it is inartificially written; but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. What he had in mind was that he wished them to have the house and lot, and not to have any trouble over it; for he added, "I don't do this because I think more of you and Lula than I do of Mary and Bettie, but I do it because you both attended to your dear old mother so good." These words show that he had in mind not something that he was going to do, but something he was then doing. In other words, they show that he intended them to have the house and lot by virtue of the letter he was then writing, and not by virtue of some instrument

he was thereafter to write. A will may be in any form. The words in which the intention of the testator is expressed are immaterial if it sufficiently appears from the instrument that he was making a disposition of his property testamentary in character. In *Clark* v. *Ransome*, 50 Cal. 595, the following note written in expectation of death was probated as a will, "Dear Old Nance: I wish to give you my watch, two shawls, and also $5,000. Your old friend, E. A. Gordon." In *Beyers* v. *Hope*, 48 Am. Rep. 89, the decedent wrote on the back of a business letter, addressed to a man and his wife, the following, addressed to the wife: "After my death you are to have $40,000. This you are to have, will or no will. Take care of this until my death." In *Hunt* v. *Hunt*, 17 Am. Dec. 438, the decedent endorsed on the back of a note, these words: "If I am not living at the time this note is paid, I order the contents to be paid to A. H." He died before the note was paid. In *Fickle* v. *Snepp*, 49 Am. Rep. 449, the instrument was in form a promissory note; in all these cases the papers were probated as a will. Indeed the general rule is that an instrument is a will if properly executed whatever its form may be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. (*Babb.* v. *Harrison*, 70 Am. Dec. 203.)

Under these principles the circuit court properly admitted the paper to probate as the will of W. R. Fletcher.

Judgment affirmed.[1]

[1] See *Arendt* v. *Arendt*, 80 Ark. 204; *In re Richardson*, 94 Cal. 63; *Kultz* v. *Jaeger*, 29 App. D. C. 300; *Brown* v. *Avery*, 63 Fla. 355, 376; *Morrison* v. *Bartlett*, 148 Ky. 833; *In re Billis' Will*, 122 La. 539; *Kennedy's Estate*, 159 Mich. 548; *Anderson* v. *Pryor*, 10 Sm. & M. 620; *Prather* v. *Prather*, 97 Miss. 311; *Barney* v. *Hayes*, 11 Mont. 571; *Cowley* v. *Knapp*, 42 N. J. L. 297; *Watson* v. *Magill*, 97 Atl. (N. J.) 43; *Fosselman* v. *Elder*, 98 Pa. 159; *Coulter* v. *Shelmadine*, 204 Pa. 120; *Rees* v. *Rees*, 11 Rich. Eq. 86; *Jones* v. *Caird*, 153 Wis. 384; *Castle* v. *Torre*, 2 Moore P. C. 133; 15 Col. Law Rev. 258; 12 Am. & Eng. Ann. Cas. 287 note; 1914 A. Am. & Eng. Ann. Cas. 89 note; 14 L. R. A. N. S. 968 note; 41 L. R. A. N. S. 39 note.

On holographic wills, see further 1 Woerner, Amer. Law Adm. (2d ed.), § 43; 5 Am. & Eng. Ann. Cas. 636 note; 14 L. R. A. N. S. 968 note; 33 L. R. A. N. S. 1018 note; 37 L. R. A. N. S. 842 note.

In those states of this country which have adopted provisions concerning nuncupative wills similar to those in § 19 of the Statute of Frauds "In the time of the last sickness" has generally been construed "*in extremis*." See *Prince* v. *Hazleton*, 20 Johns. 502; *Yarnall's Will*, 4 Rawle, 46, 65; *Boyer* v. *Frick*, 4 Watts & S. 357; *Werkheiser* v. *Werkheiser*, 6 Watts & S. 184; *O'Neil* v. *Smith*, 33 Md. 569; *Carroll* v. *Bonham*, 42 N. J. Eq. 625; *Rutt's Estate*, 200 Pa. 549. See *Johnston* v. *Glassock*, 2 Ala. 218; *Nolan* v. *Gardner*, 7 Heisk. 215; *Harrington* v. *Stees*, 82 Ill. 50. Authorities are collected in 1 Woerner, Am. Law Adm. (2d ed.), § 45; 3 Am. & Eng. Ann. Cas. 317 note; 14 Am. & Eng. Ann. Cas. 1164 note; 13 L. R. A. N. S. 1092 note.

On *rogatio testium* in nuncupative wills, see 10 Am. & Eng. Ann. Cas. 1132.

D. *A Will distinguished from other Instruments.*

KELLY *v.* PARKER ET AL.

181 Ill. 49. 1899.

Mr. JUSTICE CRAIG delivered the opinion of the court:[1]

This was a bill in chancery brought by Paul H. Kelly, the appellant, for partition of certain real estate in Cook county between himself and his sister, Clara Parker, as children and only heirs-at-law of James Kelly, deceased. The bill also prayed that an alleged deed executed by James Kelly on June 26, 1891, be set aside as a cloud on complainant's title.

There is no dispute between the parties in regard to the facts. They are as follows: For many years prior to 1891, James Kelly, of Cook county, Illinois, was the owner in fee of the following described real estate in Cook county: The west half of the northwest quarter of section 27, township 40, north, range 13, east of the third principal meridian, — except the railroad right of way owned by the Chicago and Northwestern Railroad Company. In June, 1891, Kelly was a widower and had two children living, — Paul H. Kelly, the complainant, and Clara Parker (wife of James O. Parker), his only heirs-at-law. The son, Paul H. Kelly, was married and had one daughter, Pauline G. Kelly, and the daughter, Mrs. Clara Parker, had one daughter, whose name was also Clara Parker. On June 26, 1891, James Kelly executed a deed, by which he attempted to convey said property to Clara Parker, his daughter, and Pauline G. Kelly, his granddaughter, as trustees. . . .

[The trusts in this instrument were:

"*First* — During the life of said James Kelly to allow, suffer and permit him to use, occupy, manage, control, improve and lease, for any term or terms of years, said real estate, or any part thereof, in any manner and for any purposes he may desire, and to allow, suffer and permit the said James Kelly to have, use and enjoy all the rents, issues and profits of said real estate, or any part thereof, in the same manner as if he were the owner in fee simple thereof."

The second, third, and fourth clauses provided that after the death of James Kelly the real estate was to be sold to pay any encumbrance thereon or charge in regard thereto, and to turn over the surplus to beneficiaries.

"*Fifth* — Saving and reserving, nevertheless, unto said James Kelly full power and authority, during his natural life, to let, demise, mortgage, sell and convey said real estate, or any part or portion thereof, upon such rents, considerations, terms, trusts, conditions

[1] The trust deed, which appears in full in the opinion, is abbreviated, and portions of the opinion are omitted.

and estates, in fee or any less estate or for years, and to such effect as he shall desire, and upon trust to permit him so to do, and to join him, said James Kelly, in the execution of each and every conveyance, conveyances and instruments in writing convenient or necessary to enable said James Kelly so to do, and all moneys and properties realized by the demise, mortgage or sale of said real estate, and of each and every part and parcel thereof, to suffer and permit said James Kelly to convey and dispose of in the same ways and manner as hereinbefore in this deed specified and provided with respect to the rents, issues and profits of said real estate.

"*Sixth* — Saving and reserving also to the said James Kelly full power and authority, at his option, by an instrument in writing executed under his hand and seal, to revoke this conveyance and all the powers and trusts hereby created, and require the said trustees or the said successor in trust, their or her heirs, executors and assigns, to re-convey said premises to him, the said James Kelly, or to convey the same to such person or persons as the said James Kelly may by said instrument in writing direct."

The seventh, eighth, and ninth clauses contained provisions for change of trustees and an agreement by the trustees to stand seised of the property upon the trusts expressed in the instrument.

The instrument was signed and acknowledged by James Kelly and the trustees, and a few days after its execution was delivered to T. G. Windes as agent for the trustees. — ED.]

The deed of June 26, 1891, remained in the hands of Thomas G. Windes from July 1, 1891, undisturbed, until after the death of James Kelly, in 1895, when the same was recorded by Windes and delivered by him to said trustees. On or about May 5, 1895, Kelly died, leaving him surviving no widow, but his children and only heirs-at-law, the complainant, Paul H. Kelly, and the defendant Mrs. Clara Parker. Kelly, the grantor, remained in possession and control of the property until his death.

On the hearing the court held that the instrument of June 26, 1891, was a valid deed, and entered a decree dismissing the bill, and the complainant appealed.

We have been furnished by counsel for appellant with an able brief and argument in support of their position, which, in view of the importance of the case, has been carefully considered.

It is first claimed that the instrument is void as a will because not executed and witnessed as required by the statute. Upon this point but little need be said. An instrument in writing in this State cannot pass title to property as a will unless signed and witnessed as required by section 2 of chapter 148 of the Revised Statutes. The instrument in question was not executed as wills are required by the statute to be executed, and it cannot be sustained as a will. Indeed, it is not claimed in the argument that the instrument is a will.

The second position of counsel is, that the instrument is void as a deed because it is testamentary in its character, and attempts a disposition of the property which could only be made by a will. The deed contains a grantor and a grantee. It recites a money consideration and other good and valuable considerations. It contains the granting words found in ordinary deeds of conveyance. It declares that the party of the first part "by these presents does, subject to the reservations, conditions and trusts hereinafter expressed, grant, bargain, sell, warrant, convey and assure unto the said Clara Parker and Pauline G. Kelly," their heirs, executors and assigns, forever. The deed was under seal, and acknowledged, as required by law, before a notary public. Our Statute of Conveyances, after providing a form for a deed, provides that "every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns." The deed, upon examination, will be found to contain all that is required to make a valid conveyance by the statute, and even more.

The instrument is, however, a deed in trust, and it is sought to defeat it as a deed on account of some of the trust provisions incorporated in the instrument. These trust provisions are the first, fifth and sixth, wherein the grantor, James Kelly, is allowed to use, manage and control, improve and lease, the premises during his life, and enjoy the rents and profits; also with power, during his life, to devise, mortgage, sell and convey, with power and authority, at his option, to revoke the conveyance and all the powers and trusts thereby created. It is said that "everything the grantor attempted to convey was at the same time reserved during his life, as well as the express power to revoke the instrument itself." That construction, when all the provisions are considered, can not be placed on the instrument. The conditions and reservations incorporated in the deed, as was well said by the chancellor before whom the trial was had, were intended to express the intention of the maker of the trust upon which the conveyance was made. This is apparent, because in the very clause (the fifth) which contains the reservation to the maker of the right and power, during his natural life, to let, demise, mortgage, sell and convey, etc., the premises, it is expressly declared that the deed is "upon trust to permit him to do so." The conveyance of the property is an absolute one, but the grantor is allowed to do certain things incorporated in the reservations and conditions.

It is said the grantor did not intend that the deed should take effect until after his death. The deed contains no such provision. The words of the grant are *in presenti*, and where such is the case, upon a delivery of the deed the title to the premises will pass to the grantee. Had this deed declared that the title to the premises should not pass until the death of the grantor a different question

might be presented. But such is not the language or import of the deed in question, but, on the other hand, it purports to convey the premises absolutely to the grantees at the time the deed was executed, subject to certain reservations, conditions and trusts incorporated in the instrument.

A number of cases have been cited in the argument to establish the fact that the deed in question is testamentary, and consequently void. We have carefully examined these cases, but do not think that they sustain the position of counsel. The first case relied on is *Thorald* v. *Thorald*, 1 Phillim. 1. Upon an examination of that case it will be found that the instrument involved purported to give the property after the death of the grantor. So, also, in *Turner* v. *Scott*, 51 Pa. St. 126, the instrument involved provided that "this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." In *Carlton* v. *Cameron*, 54 Tex. 77, the grantor, at the foot of the deed, incorporated this provision: "The said Abner Lee holding in reserve all the within named estates, both real and personal, during the natural life of said Abner Lee." This clause in the deed might properly be held as a qualification of the granting clause in the instrument. *Epperson* v. *Mills*, 19 Tex. 65, is somewhat like the present case, but there it was attempted to convey not only certain property which the grantor had, but such other property as he might acquire during his life, subject to certain limitations. Upon a careful examination of the case we think the fact was disclosed on the face of the deed that it was testamentary. In *Wren* v. *Coffey*, 26 S. W. Rep. 142, the deed in substance provided that the grantors did not intend it to take effect until the death of the grantors. In *Hester* v. *Young*, 2 Kelly (Ga.), 31, on the gift of the property it was expressly provided that it should take effect after the death of the grantor and his wife. In *Kinard* v. *Kinard*, 1 Speer's Eq. 256, the grant of the property was only to take effect on the death of the grantor. In *Gillham* v. *Mustin*, 42 Ala. 365, a deed of gift was made in the event the grantor should be killed in the war, but if he should survive or return then the instrument to be null and void. Under the deed, of course the title to the property did not pass. In *Mosser* v. *Mosser*, 32 Ala. 551, the instrument provided it should not take effect until after the death of the donor. *Walker* v. *Jones*, 23 Ala. 448, is also a case where, by the terms of the instrument, the gift was not to take effect until the death of the donor. In *Bigley* v. *Souvey*, 45 Mich. 370, the instrument was held to be testamentary, but it was so different from the one here involved that the case has no bearing here. *Leaver* v. *Gauss*, 62 Iowa, 314, is not in point, as the deed expressly provided the estate was only to commence on the death of the grantors. In *Massey* v. *Huntington*, 118 Ill. 80, the deed was sustained by this court as a valid instrument. In *Roth* v. *Michalis*, 125 Ill. 325, the deed was held to be testamentary, but there the instrument contained

the following: "To have and to hold the said undivided half of my real and personal estate, money, claims and demands which I may leave at the time of my death, after the payment of my just debts, in trust for the heirs of my wife." Under this provision in the instrument it could not be held other than testamentary. But the ruling in that case cannot apply here. We have also been referred to *Pinkham* v. *Pinkham*, 55 Neb. 729, where a deed was held to be testamentary and invalid, but in that case the deed expressly provided, "this deed is to take effect and be in full force from and after my death," — that is, the death of the grantor. The case does not apply here, as the deed in question contains no such provision. Indeed, our attention has been called to no case where an instrument like the one in question has been held to be testamentary. We are aware of no case in this court where a deed like the one in question has been before the court for construction. But in *Shackelton* v. *Sebree*, 86 Ill. 616, a deed was involved containing covenants of warranty with the following provision: "This deed not to take effect until after my decease — not to be recorded until after my decease." The instrument was sustained as a valid deed of conveyance. This case was followed and approved in *Harshbarger* v. *Carroll*, 163 Ill. 636. Other cases of a similar character have been cited, but it will not be necessary to refer to them here.

We are satisfied, after a careful consideration of the deed and its different provisions, that it was a valid deed, and that the title to the premises passed under it to the grantees therein, in trust for the purposes specified in the instrument. . . .

The judgment of the circuit court will be affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER: I think that the deed is testamentary and an attempt to evade the Statute of Wills.[1]

E. *Incorporation by Reference.*

ALLEN, APPELLANT *v.* MADDOCK, RESPONDENT.

11 Moore P. C. 427. 1858.

THEIR LORDSHIPS' judgment was delivered by the RIGHT HON. T. PEMBERTON LEIGH.[2]

[1] See *Brown* v. *Crafts*, 98 Me. 40; *Stone* v. *Hackett*, 12 Gray, 227; *Kelley* v. *Snow*, 185 Mass. 288; *McEvoy* v. *Savings Bank*, 201 Mass. 50; *Russell* v. *Webster*, 213 Mass. 491; *Van Cott* v. *Prentice*, 104 N. Y. 45; *Matter of Totten*, 179 N. Y. 112; *Windolph* v. *Girard Trust Co.*, 245 Pa. 349; 7 Am. & Eng. Ann. Cas. 790 note; 40 Cyc. 1084; and see *ante*, p. 100 note.

[2] Present: THE RIGHT HON. DR. LUSHINGTON, the RIGHT HON. T. PEMBERTON LEIGH, the RIGHT HON. SIR EDWARD RYAN, and the RIGHT HON. SIR CRESSWELL CRESSWELL. Only the opinion is given.

On the 1st of December, 1851, Anne, the wife of Joseph Emanuel Allen, but who was separated from her husband, and who had assumed, and was known by, the name of "Foote," drew up in her own handwriting, and signed and sealed, a paper of that date, described in its commencement as the "last will and testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property.

She had a power, under the settlement made on her marriage, to make a will, but the paper in question was attested by only one witness, and was, therefore, not valid.

On the 13th of September, 1856, being then on her death-bed, she duly executed a codicil, thus headed: "This is a codicil to my last will and testament." By this codicil, she gives to her servant, Eliza Baker, the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a sitting-room and a bed-room." The codicil appoints no executor, and contains no other reference to the will.

On the following day, the 14th of September, the testatrix died. On her death, search was made for her testamentary papers by Sir Thomas Herbert Maddock, who was one of the executors appointed by the paper described as her will, and to whom, in pursuance of the testatrix's direction, a letter announcing the event had been sent immediately upon her death. The codicil was found in a chest in her bed-room, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bed-room into an adjoining room. This paper was enclosed in a sealed envelope, on which are written the words, "Mrs. Anne Foote's will."

No other testamentary paper of any description was found.

Under these circumstances, these two papers have been admitted to probate by the judge of the Prerogative Court; and against this decree the present appeal is brought as regards the will.

The objection relied on is, that there is no such distinct reference to this paper in the codicil, as to enable the court to receive parol evidence in order to identify it; that it is not identified by the description of a "will," for that, in truth, it is not a will; that it is not identified either by date or by any reference to its contents, or by annexation to the codicil, so as to distinguish it from other papers of a like description, if more than one were found; and that to admit this paper to probate on the ground that no other is produced to satisfy the description, would be to incorporate the will in the codicil, merely by parol evidence, and not by the effect of the reference contained in the codicil itself.

It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject.

Before the "Act for the Amendment of the Laws with respect to Wills," 7 Will. IV. and 1 Vict., *c.* 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a will or codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal courts, with respect to the disposition of real estate; and the Statute alluded to having placed wills, as to real and personal property, on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the Statute, in the courts of law, are now equally applicable to the Court of Probate, with regard to personalty. In considering them, however, it is necessary to bear in mind this distinction between cases before the Statute, and subsequent cases, namely, that, before the Statute, a testamentary paper not executed so as to affect real estate, was valid as to personalty; was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the Statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil.

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of those circumstances, and to expound his meaning with reference to them.

In the celebrated treatise of Sir James Wigram, cited at the bar, these rules are stated, discussed, and explained in a manner which has excited the admiration of every judge who has had to consult it. After collecting and stating the effect of the several authorities, Sir James Wigram sums up (as it appears to us with perfect accuracy) the result in these terms: "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that — with the light which that situation alone affords — the testator's meaning can be determined by a court; the court which so determines does, in effect, declare that the testator has expressed his intention with certainty, or, in other words, that his will is free from ambiguity." (Prop. v. par. 96.)

It may be said that, on the present occasion, the Court of Probate is, to a certain extent, a court of construction; for it has to determine what is the meaning of the reference made by the testatrix in her codicil, to her last will and testament (the executor under which is to determine upon one of the gifts in the codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to.

This question is one of fact which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose, inquiry must be made and evidence must be offered to show what papers there were at the date of the codicil, which could answer the description contained in the codicil; and the court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which the testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the codicil; yet it must, in that case, have been proved, or assumed, that there was no later will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper.

That a description in a will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. "If the description in the will is incorrect, evidence, that a subject — having such and such marks upon it — exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended." (Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," Prop. v. par. 64.)

Is, then, the evidence in this case sufficient to identify the paper propounded as the will? No other paper has been found to which the description can apply; here is a paper kept by the testatrix up to the time of her death in her own possession, to which, according to her view of that paper, it does apply with the strictest accuracy.

If we are to read the codicil with the knowledge of what the testatrix knew, namely, that she had this testamentary paper, and that she had no other, can it be doubted that this is the paper referred to?

It is said, however, that this is merely the effect of parol evidence; and that there may be other wills, and that if there were two there is nothing in this codicil to distinguish which was the will referred to. Unless there were two, both imperfectly executed, and both of the

same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every will, as a last will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the will is made on the death-bed; sometimes open to great doubt, as when the will has been made many years before the death; but in every case the court admitting the instrument to probate must be satisfied that it is the last will.

Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the codicil had identified the paper, by describing it as containing certain bequests, such reference would have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that there was no later will which contained similar bequests.

No doubt the rule of law is as stated by Lord Eldon in *Smart* v. *Prujean*, 6 Ves. 565, that "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded.

In the case of *Smart* v. *Prujean*, the testator by his will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his will that he intended to leave with the abbess of a convent named, or her successor, appoint. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written, or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which enclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the abbess, which Lord Eldon thought, by the terms of the will, was an essential part

of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will, *Wilkinson* v. *Adam*, 1 Ves. & Bea. 445; but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a will might be incorporated in it.

A reference by a testator to his last will is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils, of which there may be several.

In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

In *Barnes* v. *Crowe*, 1 Ves. Jr. 497, Lord Commissioner Eyre observes: "The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three." It was decided in that case, that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make it speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir William Grant, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes* v. *Crowe*, in the case of *Pigott* v. *Waller*, 7 Ves. 118, he urged very strong reasons against the principle of that decision; but that a codicil to a will, though not referring to it, recognizes a preceding will, and amounts to a republication, he does not intimate any doubt. His words are: "A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of the republication. But a reference to the will proves only, that the devisor recognizes the existence of the will; which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He

afterwards observes, page 120: The Lords Commissioners, in *Barnes* v. *Crowe*, appear to have determined "that every codicil, duly attested, ought to be held a republication. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition referred to by Lord Commissioner Eyre, is, that the execution of a codicil should in all cases be an implied republication."

In the case of *Doe d. Williams* v. *Evans*, 1 Cromp. & Mees. 42, a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "Codicil. — I, David Evans, make a codicil to the foregoing will"; and it was held that the codicil operated to incorporate and establish the will. Mr. Baron Bayley in giving judgment, observes, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'Codicil — I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds, 'a codicil to the foregoing will'"; and the learned judge then observes, "The testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in the case of *Guest* v. *Willasey*, 2 Bingh. 429; s. c. 3 Bingh. 614, this circumstance was wanting. A testator there made his will, duly attested. On the back of this will he wrote three codicils, two unattested, and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification — it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

In the case of *Gordon* v. *Lord Reay*, 5 Sim. 274, a testator made his will, dated the 17th of August, 1812, duly executed and attested, by which he devised £10,000 to the plaintiff, charged on certain estates. He afterwards made a codicil, unattested, dated the 8th of April, 1814, by which, after reciting that he had sold the estates so charged, he directed that the legacies should be paid out of and

charged on his other real estates. On the 13th of August, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will of the 17th of August, 1812, in favor of the plaintiff, but took no notice of the codicil of the 8th of April, 1814; yet it was held, that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent case of *Utterton* v. *Robins*, 1 Ad. & Ell. 423, which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the testator made a will, dated the 12th of September, 1823, duly executed and attested, and after devising a house in Brompton Terrace to his daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated the 6th of August, 1825, signed, but not attested, the testator recited that he had sold the house given by the will to his daughter, and gave her instead of it a house in Portugal Street. He afterwards signed another unattested codicil, dated the 29th of August, 1825, to the same effect, and afterwards made several codicils properly executed and attested, for the purpose of including in the operation of his will after-purchased estates. The last of these codicils was dated the 5th of February, 1830, and was in these words: "I, John Robins, do make this further codicil to my will, which bears date the 12th day of September, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The house in Portugal Street had been purchased between the date of the will and of the codicil of the 29th of August, 1825, and the question for the consideration of the court was, to whom the house in Portugal Street passed; it being contended on the part of Mrs. Utterton, that the last codicil, though not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. The case of *Gordon* v. *Lord Reay* was not cited, and the court did not decide whether such codicil would or would not establish the unattested codicils not referred to; though Mr. Baron Parke may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. Utterton's counsel ascribe to it"; but the court held, that supposing the codicils in favor of Mrs. Utterton to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the trustees under the will. The learned judges had no doubt that any testamentary paper unattested, sufficiently referred to [in] a duly executed

and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn* v. *Jervis*, 3 Beav. 450, decided by Lord Langdale; the cases of *Guest* v. *Willasey*, *Gordon* v. *Lord Reay*, and *Utterton* v. *Robins*, were all cited; and his Lordship was of opinion, that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not.

The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words: "This is a further codicil to the last will and testament of me, Sir Thomas Clarges, Bart., made this 10th day of April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord Langdale held, that the legacy to Brundrett was not charged on the real estates, because the codicil did not so charge it, and the will charged only the legacies thereby given; but he was clearly of opinion, that the last codicil operated as a republication of all the preceding codicils, as well as of the will, though none of the codicils were referred to. His language is: "The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land, legacies which by those codicils were not so charged."

Aaron v. *Aaron*, 3 De Gex & Sm. 475, before Lord Justice Knight Bruce, recognizes the rule of law as established in *Gordon* v. *Lord Reay*, and treats it as not inconsistent with the decision in *Utterton* v. *Robins;* and his Lordship observes "that it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil.

This doctrine was very much discussed in the case of *Hitchings* v. *Wood*, before the Judicial Committee in 1841, reported in 2 Moore's P. C. Cases, 355; and many valuable observations bearing upon this question were made by Lord Lyndhurst, though, as the case arose before the Wills Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any other instrument. In either case it is necessary, and it is sufficient, that the description should be such as to enable the court, when the evidence is produced, to say what is the instrument intended.

In the case of *Shortrede* v. *Cheek*, 1 Ad. & Ell. 57, a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the court was, that, although if there had been more than one, there would have been difficulty in admitting parol evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. Mr. Baron Parke observed, in answer to the argument that there might be other notes, "Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by Lord Lyndhurst in the case of *Hodges* v. *Horsfall*, 1 Russ. & Myl. 116. A contract in writing was made, one of the terms of which related to the execution of certain buildings, "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. Lord Lyndhurst, in a bill for a specific performance of the contract, held, on the authority of *Clinan* v. *Cook*, 1 Sch. & Lef. 22, that parol evidence was admissible to prove which of the plans was intended, but he thought that the evidence was insufficient to identify the one insisted on, and on that ground dismissed the bill.

It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination of the opinion, of the judges in *Shortrede* v. *Cheek* (Wigram's "Extrinsic Evidence in aid of the Interpretation of Wills," Prop. vii. par. 165, p. 127, in note).

For the present purpose it is quite immaterial to consider the value of these objections. In this case it is clear, that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description.

The cases of *Shortrede* v. *Cheek*, and *Hodges* v. *Horsfall*, are referred to by Lord Cottenham, in *Squire* v. *Campbell*, 1 Myl. & Cr. 480, as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document, the identity of the thing referred to may be established by parol evidence.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837 altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devises of lands shall be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7th Will. IV., and 1 Vict., § 9, provides, that no will shall be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act.

In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act.

The incorporation of unattested documents by reference in an attested will was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

The only circumstance of which we are aware from which any color can be given to the argument that the Statute had the operation now suggested, is the construction put upon it by this committee, in *Smee* v. *Bryer*, 6 Moore's P. C. Cases, 404, by which it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signature; and it might be said that such a security against fraud could not be afforded if a paper only referred to in the will could be admitted as part of it. But this construction was found to produce such extensive injustice that, by the Statute, 15th & 16th Vict. *c.* 24, the Legislature interfered to alter the law so established, and this Act passed before the codicil in this case was executed. It was not contended in this case, nor, as far as we are aware, has it been contended in any case since the Wills Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil, but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.

Upon this point an important distinction has been introduced by the Act, to which we have already alluded, namely, that whereas before the Act a paper not duly executed might be a codicil as to personal estate, and might, therefore, be referred to by that description, no such paper can now be properly so designated.

That, with this exception, the law on this subject remains as it was before the Act, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found.

In April, 1841, the question now raised came before the Prerogative Court in *Smith's Case*, 2 Curt. 796. In that case the testator, in May, 1838, made a codicil to his will, signed but not attested. In August, 1840, he made a further codicil, signed and duly attested. This was written on the second side of the paper[1] on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament." Sir Herbert Jenner Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also."

In the case of the *Goods of Sotheron* 2 Curt. 831, the same learned judge recognized the rule as laid down in *Smith's Case*, but held the reference in the will not to be sufficient to let in evidence of the paper propounded.

In January, 1843, in the case of *Claringbull*, 3 Notes of Cases, 1, Sir Herbert Jenner Fust again acted on the rule laid down in *Smith's Case*, referring to it as the interpretation which this court has put upon the Statute of Wills.

In the course of the same year he had to determine the important case of *Lord Hertford's Will*, 3 Curt. 468. The testator had there made a will and twenty-nine codicils. Some of the codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of which were attested, and others not. One codicil, made at Milan in October, 1838, was unattested. He made a further codicil dated in April, 1839, duly executed and attested, and thereby declared that he ratified and confirmed his will and codicils. The question was whether the Milan codicil was thereby established, and it was decided by Sir Herbert Jenner Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the court could not, therefore, extend the words of reference to an instrument not answering the description.

In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of Sir Herbert Jenner Fust, and the decision was affirmed (4 Moore's P. C. Cases, 339). Dr. Lushington, in delivering the judgment of the Committee, observed very strongly upon the inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified; but he also relied on the ground of the judgment in the court below, namely, that there being no reference to the particular paper, except under a general description of "codicils," and there being instruments which properly answered the description of codicils, the words could not be extended to an instrument not properly answering the description.

[1] See *In re Plumel's Estate*, 151 Cal. 77.

This was the case mainly relied on by the appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, nothing in it inconsistent with the rule adopted in the cases of *Smith* and *Claringbull*, which applied under the new Act the principles adopted under the old.

The question came again before Sir Herbert Jenner Fust in the case of *Ingoldby* v. *Ingoldby*, 4 Notes of Cases, 493, in 1846. In that case, the testator made an unattested codicil to his will; he afterwards made a second, properly attested, with the words, "This is another codicil to my will." On his death, these two codicils only were found, and Sir Herbert Jenner Fust admitted them to probate. The learned judge observes: "I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's Case*. There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it is not duly executed; but it is clear that the testator intended it to be a codicil, not only from the paper itself, but from the indorsement; and it was attached to the will by sealing-wax, without a seal. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." The learned judge then adverts to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverts to it as a not immaterial circumstance, but does not make it the *ratio decidendi*.

The same question again came before the court in 1849, in the *Case of Phelps*, 6 Notes of Cases, 695. There the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir Herbert Jenner Fust held, that the first codicil was not established by the second, for the instrument in question was not a codicil; and, therefore, the confirmation of the will did not amount to a confirmation of the codicil.

In the case of *Haynes* v. *Hill*, 7 Notes of Cases, 256, the point once more arose in August, 1849. In that case, a testator made his will and several codicils, the last of which only was attested. The last codicil confirmed the will, but said nothing of the codicils. The question was in truth the same as had arisen in *Phelps's Case*, and the same decision was pronounced. Sir Herbert Jenner Fust went very fully into the doctrine, and held, as it seems on the most satis-

factory grounds, that the case was governed by *Lord Hertford's*, there being no reference to anything but the will, and the unattested codicils not being part of it.

These cases, when compared with *Gordon* v. *Lord Reay*, clearly illustrate the distinction introduced by the Wills Act, to which we have already adverted.

In the *Case of the Countess Dowager of Pembroke*, 1 Deane's Ecc. Rep. 182, Sir John Dodson, from whose decision the present appeal is brought, followed the decision of Sir Herbert Jenner Fust in *Sotheron's Case*, but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.

The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made. The facts on which we rely are, beyond all question, admissible in evidence, namely, that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an indorsement describing it as her will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence is the proof of an earlier will, which the testatrix destroyed.

Their Lordships, therefore, are of opinion, that the decree complained of must be affirmed, and they think that the costs of all parties must come out of the estate. They cannot properly refer to the extra-judicial opinion of any individual, however eminent, as an authority for their decision; but it is satisfactory to them to observe that (in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage) Lord St. Leonards treats as clear, a point which, from its extreme importance, their Lordships have thought it advisable to examine at so great a length. In the "Handy Book on Property Law" (sixth ed. 151), we find the following passage: "So a will or codicil not duly executed, may be rendered valid by a later codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will, although not duly executed." That

very learned author then points out the distinction, where there are several wills and codicils, and refers to the decision in *Lord Hertford's Case,* which he understands as we do.[1]

GOODS OF ALMOSNINO.

1 Sw. & Tr. 508. 1859.

In this case the testatrix died on the 31st of December, 1858. On a table in her room was found an envelope, which had been sealed, but the seal was broken, directed to Mr. Azuelos, No. 62, Bishopsgate Street Without. Within this was another envelope, sealed and directed "For Mr. Azuelos, No. 62, Bishopsgate Street Without. I wish him to open this letter immediately I am dead, or, if he should not be in London at the time of my death, it must be delivered to Mr. S. Almosnino, No. 11, Bevis Marks, City."

On the inner envelope was also written, "I confirm the contents written in the enclosed document, in the presence of Richard Morse and Sarah Praeger, this 29th day of December, 1858.

"A. Almosnino,
"Richard Morse, 8, Charing Cross.
"Sarah Praeger, 25, Esher Street,
Upper Kennington Lane."

Inside this envelope, when opened, was found a paper in the deceased's handwriting, commencing thus: —

"My dear Nephew, — You will be doing me a charity if you will comply with my last wishes; I always found you very kind, and I hope you will not refuse my last request," etc. The paper proceeded to give directions as to her funeral, and the disposition of her property; it was signed by her, but not attested; and mentioned no executor. From the affidavit of Judah Azuelos, it appeared that he was nephew of deceased's husband, and was in the habit of visiting the deceased, who had frequently mentioned to him a paper containing instructions to be attended to after her death, and addressed to him; that on the 29th of December, 1858, he told her that such a paper ought to be signed by two witnesses, when the deceased sent for Morse, and signed the memorandum of confirmation written by Morse on the inside envelope; that the paper writing and the addresses on the envelopes were in the deceased's handwriting; that the seal on the inner envelope remained unbroken when the memorandum was written (the deceased objecting to have it

[1] Compare *Pope* v. *Pope,* 95 Ga. 87; *O'Neall* v. *Farr,* 1 Rich. Law 80; *Goods of Greves,* 1 Sw. & Tr. 250; *Goods of Dallow,* L. R. 1 P. & D. 189; *Singleton* v. *Tomlinson,* 3 App. Cas. 404; *Goods of Balme,* [1897] P. 261. And see *Hannis* v. *Packer,* Ambi. 556; *Rose* v. *Cunynghame,* 12 Ves. Jr. 29.

opened), and that the same seal was found unbroken after her death when the inner envelope was cut open.

Richard Morse, at whose house the deceased lodged, deposed that he went into her room on the 29th of December, 1858, at Mr. Azuelos' request, and wrote the memorandum on the inner envelope, which was signed by the deceased in his presence, and that of Sarah Praeger, and that they then attested it; he gave the same account of the condition of the envelopes and seals as Azuelos did, which was confirmed by S. Almosnino, who, after deceased's death, had cut open the inner envelope.

Mr. Dowdeswell moved the court to decree probate of the paper writing and of the inner envelope, as together containing the will of the deceased, to Judah Azuelos, as executor according to the tenor. Parol evidence is admissible for the purpose of showing that the paper writing was the document referred to by the memorandum.

Sir C. Cresswell. Is there any case in which a paper has been held to be incorporated, by reference, with one duly signed and attested, where there was no description whatever of the paper supposed to be referred to? It seems to me to differ from most of the cases cited in *Allen* v. *Maddock*, 11 Moore, P. C. 427; the deceased does not call it a will or testamentary paper, or in any way describe it; the words are simply, "I confirm the contents written in the enclosed document."

Cur. adv. vult.

Sir C. Cresswell. In this case application was made for probate of a paper under rather singular circumstances. The deceased wrote a paper giving directions for the disposition of her property after her decease, and apparently not wishing any one to know the contents, she enclosed it in an envelope on the outside of which, in consequence of a suggestion that any paper to be acted upon after her death ought to be signed by two witnesses, was written, "I confirm the contents written in the enclosed document," etc.; this was duly signed by the deceased and attested by two witnesses. The question is, whether parol evidence can be received to identify the document purported to be confirmed, and, if so, whether the evidence of identity is sufficient? Where a duly executed paper contains a reference to another testamentary paper the court is at liberty, by parol evidence, to ascertain all the circumstances of the case so as to place itself, as far as possible, in the situation of the testator, the meaning of whose language it is called upon to declare; for on such occasions the Court of Probate is to some extent a court of construction; but parol evidence is inadmissible to prove intention. In *Allen* v. *Maddock*, all the cases on this point were elaborately reviewed. Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum indorsed on the inner envelope. The parol evidence shows that the envelope was sealed in a particular manner, and that it

was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and one only was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed. *Probate granted.*[1]

BRYAN'S APPEAL.

77 Conn. 240. 1904.

APPEAL from a judgment of the Superior Court in New Haven County, GAGER, J., refusing to admit to probate a certain written instrument as part of the will of Philo S. Bennett of New Haven, deceased. *No error.*

TORRANCE, C. J. The Court of Probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its 12th clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars ($50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the 12th clause of the will, two writings hereinafter referred to as exhibits *B* and *C*.

The Court of Probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the Superior Court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit *A;* while exhibits *B* and *C* are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit *B* is a letter from the testator to his wife, of which the following is a copy: —

"New York, 5/22/1900.

"My Dear Wife, — In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to

[1] Compare *Fosselman* v. *Elder*, 98 Pa. 159; *Van Straubenzee* v. *Monck*, 3 Sw. & Tr. 6.

As to the validity of a will on several unattached sheets, see 1915 A. Am. & Eng. Ann. Cas. 1208 note.

remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennet, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Nebr., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett."

Exhibit *C* was a typewritten duplicate of Exhibit *B*, except that the words "with love and kisses, P. S. Bennett," at the end of Exhibit *B*, were not contained in Exhibit *C*, nor was Exhibit *C* signed by the testator.

Respecting these exhibits the appellant in the Superior Court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit *C* was then also prepared as a blank draft form from which Exhibit *B* was to be, and was subsequently, drawn; that Exhibit *B* was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. (Seal)"; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit *B* in his box in a vault in the Wool Exchange Building in New York City, where they remained as he put them until after his death, the will being "separate from said letter and said sealed envelope"; and that Exhibit *C*, from the time it was drawn up, remained in Bennett's custody till his death, and was found soon after that event among

his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault, Wool Exchange."

The appellant then offered Exhibit *C* in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit *B*, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit *B*, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit *B* was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that exhibits *B* and *C* "are not either separately or together a part of the last will of said Philo S. Bennett, deceased"; and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2) that even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter, Exhibit *B*, shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by reference in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a dispositive one; and one of the leading cases upon this subject is that of *Allen* v. *Maddock*, 11 Moore's P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under the statute of frauds. The English rule appears to prevail in many of our sister States; but the question whether it prevails in this State, and if so, with what limitations and under what conditions, was left undetermined in *Phelps* v.

Robbins, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.[1]

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in *Phelps* v. *Robbins*, *supra* (272), as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt." *Estate of Young*, 123 Cal. 337, 342. In an important and well considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing — that is, at the time of the execution — in such terms that it may be ascertained. . . . The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document." *In the Goods of Smart*, L. R. (1902) P. D. 238, 240.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found

[1] The doctrine of incorporation by reference does not exist in Connecticut. *Hathcway* v. *Smith*, 79 Conn. 506. See *Newton* v. *Seaman's Friend Society*, 130 Mass. 91; *Booth* v. *Baptist Church*, 126 N. Y. 215; *Cook* v. *White*, 43 App. Div. 388; affirmed in 167 N. Y. 588; *In re Emmons' Will*, 96 N. Y. Supp. 506; *In re Reins' Estate*, 112 N. Y. Supp. 203. Many American authorities are collected in 1 Am. & Eng. Ann. Cas. 395 note; 68 L. R. A. 353 note; 13 Prob. Rep. Ann. 111.

For cases in which equity will impose a constructive trust on a devisee or legatee where the existence of a trust but not its terms are disclosed on the face of a will, see Scott's Cas. on Resulting and Constructive Trusts, pp. 85–95.

with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to." *Phelps* v. *Robbins*, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming then, without deciding, that the doctrine of incorporation prevails in this State, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

There is no error.

In this opinion the other judges concurred.[1]

MAGNUS, Executor *v.* MAGNUS et Al.

80 N. J. Eq. 346. 1912.

Stevens, V. C. This is a bill for the construction of the will of Clara L. Dotger. The controversy hinges on the effect of its third paragraph, which reads as follows:

"*Third.* In the event that my personal estate shall be insufficient to pay the legacies above named, in full, then I order and direct that the said legacies shall abate proportionately and in the event that there is a residue after the payment of expenses, taxes and all charges against my estate, I give the same to my niece Clara Seidensticker to dispose of in accordance with my instructions to her. I also give and devise to my said niece Clara Seidensticker the house and lot in which I now reside known as No. 65 Montrose Ave. as long as she and her mother live and after their deaths, I give and devise the said house * * * unto my niece Elsa Norton."

After the death of Clara L. Dotger there was found in a drawer of her bureau an envelope addressed in her handwriting to Clara

[1] It was subsequently held that there was a resulting trust for the residuary legatees. *Bryan* v. *Bigelow*, 77 Conn. 604.

Seidensticker, in which was contained a paper in the same handwriting, reading as follows:

"Montrose, South Orange, N. J.

"Dear Clara — So long as I was changing the will I thought I would shorten it and tell you what to do. I want you to dispose of the most of my books to friends. The house is for you and your mother as long as you live and then to go to Elsa Norton. I want Claire to have my best pin, pearls and diamonds when she is twenty-five years old or if she marries at that time, if she is old enough to value it. To Fred Smith I want my set of Shakespeare given and to Wynifred one of my rings or pins. Give Frank one of the rings and Victor books as you wish and to Maud a few books to Mary Steinhauser a picture. The idea was to give you the house and lot but it is hard work for me to divide the things, so I will have to trust it to you to do. The best you know how — You might offer one carriage to Andrew Smith and do with the others as you wish. You need not feel obliged to live in the house, it will rent readily. I trust you implicitly to do the best you can.

"Aunt Clara.

"August 1909.

"Mrs. King in Brooklyn I would like you to send a check to. It is impossible to mention every one.

"C. L. D.

"I would like Roy to have a thousand dollars and some little keepsake.

"C. L. D."

The testatrix died in August, 1910. The will is dated November 29th, 1909, and so, if the date of its writing is proved by the letter itself, the letter antedates the execution of the will. The question is whether this letter can be taken as part of the will.

In the sixth American edition of 1 Jarm. Wills. *99, it is said that two things are necessary: "first, that the will should refer to some document as then in existence; secondly, proof that the document propounded for probate, was in fact written before the will was made, and was identical with that referred to in it."

The will in question reads, "I give the same [my personal estate] to C. S. to dispose of in accordance with my instructions to her." The testatrix does not here limit herself either to written instructions, or to instructions, written or verbal, given before the will was executed. Verbal instructions would satisfy the language used and so would instructions, verbal or written, given subsequently. All the cases require a writing and hold that it must be *in esse* at the time of execution; and they all declare that uncertainty in the reference is fatal. A leading case is *Smart* v. *Prujean*, 6 Ves. 560. There testator, by will duly attested, gave real estate

to J. upon trust (*inter alia*) that he should apply the rents unto such persons and for such ends as he, the testator, should, by a private letter, or paper, of instructions, which he in his will mentioned he intended to leave with Mrs. J., then residing at Gravelines, or with her successor, for the time being, direct or appoint. Immediately after testator's death, in his bureau in the room in which he had resided, two paper-writings were found in the same envelope with the will, which envelope was sealed up and endorsed in the hand of the testator, "The Will of Anthony Lowe."

It is apparent that the case cited is stronger for the incorporation of the paper than the case in hand; for the will there expressly mentions a writing, while here the will speaks only of "instructions" which might have been oral. And yet Lord Eldon held the identification incomplete. He says: "There is another ground: not whether the same envelope or superscription is *evidence* that the testator meant these should be the papers referred to, but whether *I must of necessity* collect from the contents of the will that they should be considered the same. The same cover is nothing with reference to the statute, and the superscription has not three witnesses. The true question is, if these papers were found in the bureau with the will, can I say, from the contents of the will, these two papers are the papers referred to? Suppose several other papers were found with them, could I say this will would have enabled me to select these two as the only papers referred to?"

In all the cases cited by counsel there was a writing, and this writing was referred to in terms sufficient to identify it. Thus, in *Dickinson* v. *Stidolph*, 11 C. B. (N. S.) 341, the language was: "I hereby appoint Mrs. S. J. my sole executrix to this my last will revoking all former wills excepting two memorandums dated 10th May, 1819"; and in *Newton* v. *Seaman's Friends Society*, 130 Mass. 91, "to pay the several legacies according to the directions written in a book by M. signed by me A. D. and witnessed by said M."

It would seem, therefore, that the reference in the will under consideration is insufficient, first, because it fails sufficiently to identify the writing to be incorporated, and second, because by "instructions" the testator does not limit herself either to written instructions or to instructions then given. The language used is broad enough to include future instructions: "wishes, which [to use the terms of the bequest in *Olliffe* v. *Wells*, 130 Mass. 221] I have expressed to him or may express to him." In *Hartwell* v. *Martin*, 71 N. J. Eq. (1 Buch.) 157, the testator directed the payment of his outlawed debts in the following language: "A list of all debts that I wish paid will be found enclosed with this will," and Vice-Chancellor Bergen found this reference inadequate because the paper might have been changed from day to day after the will was made, and the gifts enlarged or diminished as often as testator might have seen fit to vary them.

Concluding that the paper cannot be read as part of the will, it would be idle to attempt its construction; but this observation upon counsel's argument is pertinent. He first seeks to make the letter part of the will by trying to show that in the absence of other evidence *its contents* are themselves proof that it is the "instructions" referred to. Having thus incorporated it, he then proceeds to argue very elaborately, and not without plausibility, that it contains no instructions, properly so called, but merely recommendations or suggestions which the legatee is not bound to observe; whereupon he argues that she takes the whole residue free from any trust. If this be so, it is demonstrated by the contents of the letter that it is *not* the instructions referred to, unless we are, without any help from the will itself, prepared to give to the word "instructions" the non-natural meaning of recommendations carrying with them no obligation.

I think it is plain that the paper cannot be read as part of the will. If it cannot, then the bequest fails and the next of kin take the residue. *Hartwell* v. *Martin*, 71 N. J. Eq. (1 Buch.) 157; *Condit* v. *Reynolds*, 66 N. J. Law (37 Vr.) 242; *Smith* v. *Smith*, 54 N. J. Eq. (9 Dick.) 1; 56 N. J. Eq. (10 Dick.) 821.[1]

GOODS OF TRURO.

L. R. 1 P. & D. 201. 1866.

THE Dowager Lady Truro died on the 21st of May, 1866, leaving a will dated the 15th of September, 1865, and a codicil dated the 10th of October, 1865. The will contained the following clause: "I likewise bequeath to the present Baron Truro, in affectionate recollection of his kindness to me, all my library and books and maps, except such parts thereof as I shall herein or after or by codicil otherwise dispose of; and also all my engravings, paintings, pictures, and drawings, save and except such parts thereof as I shall herein or after or by codicil otherwise dispose of; also all my household bed and table linen, and also all such articles of silver plate and plated articles *as are contained in the inventory signed by me and deposited herewith.*"

The will was deposited by the deceased at Messrs. Coutts', the bankers, in an envelope with an indorsement in her writing, and in the same envelope with the will was found an inner envelope containing a list of plate. The list, which was in several sheets, was

[1] See *In re Plumel's Estate*, 151 Cal. 77; *Hunt* v. *Evans*, 134 Ill. 496; *In re Sexton*, 162 Ill. App. 222, aff'd in 253 Ill. 528; *In re Bresler's Estate*, 155 Mich. 567; *Allday* v. *Cage*, 148 S. W. (Tex.) 838; *Goods of Lancaster*, 29 L. J. (P. & M.) 155; *Goods of Sunderland*, L. R. 1 P. & D. 198; *College of North Wales*, v. *Taylor*, [1908] P. 140; *Goods of Kehoe*, 13 L. R. Ir. 13.

headed "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. AUGUSTA E. TRURO." The list was signed by the deceased in several places, and on the last sheet was her signature and the date, 21st of September, 1865. Affidavits were filed showing that the will and the list were deposited with Messrs. Coutts on the 21st of September, 1865, and that the codicil was deposited at a subsequent date. One of the affidavits also proved that when the will was executed the attention of the testatrix was called to the importance of signing the inventory and depositing it with her will, and that she intimated her intention of acting upon that suggestion.

The Queen's Advocate and *Dr. Spinks* moved for probate of the will of the 15th of September, 1865, the list of plate dated the 21st of September, 1865, and the codicil of the 10th of October, 1865.

SIR J. P. WILDE. I have very serious doubts whether I could allow this list to form part of the probate if the question depended upon the words of the will, because, although to some extent they point to an existing document, I should, construing them by the existing facts, read them as meaning, not that the document had been signed at the time when the will was executed, and would be deposited with it, but as meaning that it would be signed and deposited when the will should be deposited. There is no distinct reference to an existing document. For, though the testatrix, in using the words, "signed by me, and deposited herewith," would *prima facie* seem to mean "now already signed and deposited," yet those words, like all others in a written document, must be construed in connection with the existing and surrounding state of things. Now, the will could not have been deposited at the time at which the testatrix was speaking, and the list when produced was plainly not signed till the 21st of September. The true meaning, therefore, of the words, as spoken at that date, would seem to be, " a list which I intend to sign and deposit," &c. It is, however, unnecessary to decide whether the list is incorporated with the will, because I am of opinion that it is entitled to probate by force of the codicil.

This makes it material to look into the decisions on the subject. The general rule as to the consequences of republication is thus laid down by a most careful and learned text-writer: "It has long been settled law that the republication of a will is tantamount to the making of that will *de novo;* it brings down the will to the date of the republishing, and makes it *speak*, as it were, *at that time.* In short, the will so republished is a new will." (Williams on Executors, part i. b. ii. § 2, page 188, 5th ed.)

He then goes on to refer to numerous cases which have been decided in accordance with this principle, and amongst others to *Skinner* v. *Ogle*, 4 N. of C. at page 79, where it was held that "a codicil duly executed will give effect and operation to a will altered after the passing of the Act, although the alteration was not duly

attested, and though the will itself was executed before 1838," and to *In the Goods of Hunt*, 2 Robert. 622, where Sir John Dodson held that a codicil duly executed will give effect to unexecuted papers which have been written between the periods of the execution of the will and the codicil, although the latter does not refer to the former.

The question came before Sir C. Cresswell in March, 1863, *In the Goods of Stewart*, 3 Sw. & Tr. 192, and in June, 1863, *In the Goods of Matthias*, 3 Sw. & Tr. 100. In the first case, the will contained this clause: "I direct my executors to distribute all pictures, books, and other articles according to any list or lists signed by me." A paper was found without any date, but which was executed before a second codicil, headed "List referred to in my will and codicil." The second codicil commenced "This is a codicil to the last will and testament of me . . . I hereby confirm my last will with all the codicils thereto duly signed by me." "Held that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil was entitled to be admitted to probate as a portion of the will confirmed by the codicil."

In the second case the testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862. On her death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. It was held "that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate." The learned judge is reported to have said: "Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of the will which was no part of the will before, and the codicil contains no reference to the memorandum?" And accordingly probate of the memorandum was refused. Now there is no doubt that probate could not have been granted of that memorandum, because, treating the will as having been re-executed at the date of the second codicil, the reference was not sufficient to incorporate it according to the rule laid down in *Allen* v. *Maddock*, 11 Moo. P. C. 427. But if the language of the learned judge was intended to have a universal application, if it is to be taken as laying down a general rule that by the kind

of re-execution of a will which is involved in the execution of a codicil nothing can be inferentially added to a will which it did not contain before, it is at variance with the decision of the same learned judge in *In the Goods of Wyatt*, 2 Sw. & Tr. 495. In that case a testator executed a draft will in April, 1847, and an engrossed will in May, 1847. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and in pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink but not as altered in pencil. Probate was decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil. If the proposition laid down by the learned judge in *In the Goods of Matthias* is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers.

After considering these cases I have come to the following conclusion as to the rule by which the court should in future be guided in dealing with the republication of a will by a subsequent codicil.

It is plain on the one hand that the republication of the will, which is involved in the execution of a codicil, may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. The case just quoted, *In the Goods of Wyatt*, 2 Sw. & Tr. 494, in which the codicil was held to give effect to alterations made in the will after its execution, is a direct authority for this proposition. On the other hand it is plain that there must be a very distinct limit to the action of the court in this direction. For the tendency of such a doctrine, if not restrained, would be to place unexecuted papers on the same footing with those which have received due execution, merely because they were in existence at the subsequent date of the execution of a codicil. The court cannot, according to the authorities, give greater or less effect to a codicil than this: to treat its execution as if the testator had at the same time sat down and re-executed his will. Looked at in that light, the following rule would appear to be the consequence: Where the will, if treated as executed on the date of the codicil, and read as speaking at that date, contains language which, within the principle of *Allen* v. *Maddock*, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

Applying that doctrine to the present case, and treating this will as having been re-executed on the date of the codicil, its language runs thus: "And also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." Now, construing these words by the light of the events which had then happened, they appear with sufficient distinctness to refer to a document then existing. For the inventory referred to had then been signed by the testatrix and deposited at the bankers. The operation of the codicil as a re-execution of the will, therefore, gets rid of all difficulty, and I admit the will and the codicil to probate, together with the inventory signed by the testatrix.[1]

BURTON *v.* NEWBERY.

1 Ch. D. 234. 1875.

Joshua Malden, by his will, dated the 7th of December, 1837, and duly attested, devised certain real estate, specifically described, and all and singular other his messuages, lands, tenements, hereditaments, and real estate to George Newbery and John Ryland, and their heirs upon trust to receive the rents and profits thereof during the lives of his daughters, Elizabeth Burton and Mary Morton, and apply such rents upon the trusts therein mentioned, and from and after the decease of Elizabeth Burton and Mary Morton upon trust to sell the same, and hold the proceeds of sale upon the trusts of his (the testator's) residuary personal estate; and the testator thereby bequeathed his residuary personal estate upon certain trusts during the lives of Elizabeth Burton and Mary Morton; and after their death he directed the same to be equally divided between such of his thirteen grandchildren therein named (two of whom were William Burton and Ann Burton) as should being grandsons attain twenty-one, or being granddaughters attain that age or marry.

By a codicil dated the 12th of October, 1838, and attested by Elizabeth Burton, William Burton, and Ann Burton, the testator directed that the rents of certain real estate purchased by him on the 13th of July, 1838, and the 10th of October, 1838, should be disposed of in the same manner as the rents of all his other estates; and he further desired that his executors should sell such real estate, and dispose of the proceeds in the same manner as the moneys arising from all his other estates.

The testator made another codicil, dated the 1st of April, 1839, and in the following terms: "This is a codicil to my last will dated 7 December, 1837: and I hereby give and bequeath unto my daughter Elizabeth Burton £600, which I desire my executors to

[1] Compare *Goods of Mary Reid*, 38 L. J. N. S. (P. & M.) 1; *Durham* v. *Northern*, [1895] P. 66; *Goods of Smart*, [1902] P. 238.

pay to her within twenty-four months after my decease." This codicil was duly attested by two witnesses.

The testator died shortly after the date of the last codicil. Of the thirteen grandchildren named in the will, twelve (including William Burton and Ann Burton) attained twenty-one.

The suit was instituted for the administration of the trusts of the testator's will, and now came on to be heard on further consideration. Elizabeth Burton and Mary Morton were both dead; the testator's real estate had all been sold; and the question was, whether the testator had effectually devised to William Burton and Ann Burton two twelfth shares of the proceeds of the property comprised in the codicil of the 12th of October, 1838.

JESSEL, M. R. The case I have before me is one of some little singularity, and perhaps of some novelty, and it compels me to consider some of the prior authorities, and to say how far they appear to me to be consistent with principle. The 15th section of the Wills Act in effect makes void any gift by a testamentary instrument to attesting witnesses and certain other persons, such as the wives and husbands of attesting witnesses; but it does not in any other way affect the validity of the testamentary disposition. If, therefore, a testator makes a testamentary disposition containing a gift to the attesting witness, the attesting witness takes nothing under it.

This particular testator having made his will on the 7th of December, 1837, before the Wills Act, made a first codicil, which bears date the 12th of October, 1838, and thereby gave benefits to the attesting witnesses. It is clear, if nothing more had been done, that those benefits would not have been taken by them. He then made a second codicil, not, however, calling it a second codicil, which bears date the 1st of April, 1839, and it is in these terms: [His Lordship read it as set out above.] The first point raised on behalf of the claimants is this: they say that the effect of this second codicil is equivalent to a re-execution of the first codicil, in other words, that the second codicil is not only equivalent to the re-execution of the will standing alone, but of the will plus the first codicil, and the question I have to decide is, whether that is the effect of the second codicil. I wish I could say that the law on the subject was clear; that it was perfectly consistent with principle; and that the authorities were not to a great extent conflicting. I cannot say so; but I can say what is my opinion of the law derived from those conflicting authorities, and having regard to principle.

Now it appears to me that any testamentary instrument properly attested may incorporate into it by reference as a part of the testamentary instrument any prior writing, whether such prior writing be attested or not, and that if the incorporation is made in such a manner that the court can find out from the properly attested instrument what is the prior instrument intended to be referred to, then

the prior instrument becomes a part of the testamentary instrument to all intents and purposes.

That I take to be the principle, and the question is whether such reference is necessary. I think it is, and as I read the judgment of Baron Bayley, in the case of *Doe* v. *Evans*, 1 Cr. & M. 42, he puts the law very much in the way I have stated. The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet, and the learned judge says: "Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up." In other words, the mere fact of its being a codicil alone will not do; it must refer in some shape or another to the instrument which is set up. In the case of *Aaron* v. *Aaron*, 3 De G. & Sm. 475, which came before Vice-Chancellor Knight Bruce, he recognized the authority of *Doe* v. *Evans*. Whether he also intended to recognize the authority of *Gordon* v. *Lord Reay*, 5 Sim. 274, I am not sure. After reading at length the judgment of Baron Bayley, in *Doe* v. *Evans*, he says (3 De G. & Sm. 479): "Now, it can make no difference whether the codicil be written on the same paper with the will or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was." Then he reads the codicil at full length, and you find that it begins thus: "Whereas I, John Aaron, have made and duly executed my last will and testament in writing, bearing date the 23d day of August, 1828, and also a codicil annexed thereto, bearing date the 21st of May, 1831." Then he says, "It is perfectly clear, in my opinion, what the instrument here mentioned is." Of course; it was described as a codicil. Then he goes on, "The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question independently of the case of *Gordon* v. *Lord Reay*, and the observations of Bayley, B., in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a court of law, say that the effect of the will and second codicil was to place the first codicil in the same situation as if it had been attested by three witnesses." He does not say there whether he does or does not approve of *Gordon* v. *Lord Reay;* but these two cases of *Doe* v. *Evans* and *Aaron* v. *Aaron* are entirely in accordance with what I consider to be the principle, which is, that the setting up instrument must contain a distinct reference to the prior writing, so as to show that the testator intends that prior writing to be a part of his testamentary disposition.

Gordon v. *Lord Reay* is a case very difficult to deal with. In argument, undoubtedly the point was taken by Sir Edward Sugden for the defendants. He says that an instrument duly attested can only republish an instrument not duly attested to which it expressly refers.

In *Gordon* v. *Lord Reay* there was a codicil, which, as the law then stood, was perfectly valid as regarded personal estate; but it was not valid as regarded real estate for want of due attestation. Then there was a second codicil, which was in these terms: "Whereas I have in and by my last will and testament, bearing date the 17th of August, 1812, made several provisions and bequests in favor of Susan Harriet Hope," &c., "now I do hereby confirm such bequests and provisions," "and I do hereby ratify and confirm this by my hand and seal, dated the 13th of August, 1818," and there is nothing more. A reference is made to provisions made by the will, with the date of it, and a confirmation is made of those provisions. The testator had also made substantial provisions for the lady by the first codicil, but I confess I cannot find, on the face of the second codicil, any reference whatever to the first codicil, nor can I find any reference to any will which would include the codicil, because the only will referred to is a will bearing date the 17th of August, 1812, which was the date of the original instrument, and the codicil was dated the 8th of April, 1814. Therefore it is not (as was put to me in argument) the case of a man saying simply "I confirm my will," and it being held that the term "will" included every testamentary disposition, whether contained in a thing called a will as distinct from a codicil, or in a thing called a will, being a will plus several codicils. The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. I am obliged to say this, because I admit that the decision was the other way. Unfortunately, we have no reasons given. The judgment of the Vice-Chancellor is in these terms: "My opinion is that the second codicil does republish the first. The first codicil is part of the will." [It was part of the will for the purpose of the personal estate, but not part of the will for the only purpose for which the Vice-Chancellor had to consider it — that is as regarding real estate.] "And if the second codicil is a republication of the will, it is a republication of everything which is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it." It does appear to me that that is a fallacy, that where you describe a will by its date you do not describe the subsequent codicil as being included in that will. It may well be, that where you describe a will generally, without date, and say, "I confirm my will," you might interpret the word "will" as including the whole of the testamentary disposition; but it does appear to me that that was not the case in *Gordon* v. *Lord Reay*, and I cite, in reference to this point, the observations made in the case of *Crosbie* v. *MacDoual*, 4 Ves. 610, and those made by Lord Selborne in the recent case of *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19. They both go to this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument. The point in *Crosbie* v. *MacDoual* was

this: The testator made a will; he then made several codicils, the fourth of which revoked certain annuities given by the will, and then, last of all, he made a codicil confirming the will, but not all the codicils, and the question was whether he had revived the gift which had been revoked by the intermediate codicil. It was held he had not: and the then Master of the Rolls distinguished the case from the case of *Lord Walpole* v. *Lord Orford*, 3 Ves. 402, where a man having made two wills, and unfortunately not having destroyed the first, made a codicil, and the transcriber having the first will before him, as well as the second, by mistake (of which they would not allow evidence to be given), confirmed the first will, which was inconsistent with and had been revoked by the second; and it was held that the confirmation of the first will, though it had been revoked, set it up again. It was a writing which, though revoked and good for nothing, was as much incorporated by the codicil as though it had been written out again in words, and consequently it revoked the intermediate and inconsistent will. But, as pointed out by the Master of the Rolls, that does not apply to a will and codicil followed by a second codicil inconsistent with the prior codicil; there is no occasion in such a case to assume that you do revoke the intermediate codicil. So in a case where you make a will with subsequent codicils, you may intend merely to revoke the will, and leave the codicils standing, which was the decision in *Farrer* v. *St. Catharine's College*. There, the argument was pressed that the revocation of a will, being the revocation of everything which is part of it, must revoke all the codicils. The answer was, you do not revoke the will in that sense, but you revoke an instrument called a will of a certain date; therefore the revocation does not go beyond that. I must say it does not appear to me that the case of *Gordon* v. *Lord Reay* was decided according to principle, and that the true principle was that which was laid down by Baron Bayley in *Doe* v. *Evans*, which has been certainly followed, whereas I am not able to find that the case of *Gordon* v. *Lord Reay*, though quoted, has ever been followed at all.

Then there is a second point, which is this: The codicil gives certain after-acquired lands substantially on the same trusts on which the testator had given the residue of his real estate. According to the doctrine now established by *Christie* v. *Gosling*, L. R. 1 H. L. 279, you are to read the words referred to as if they were incorporated in the instrument. The consequence would be that the attesting witness would take a share of the money to arise from the sale of the lands; but then that share is forfeited by the law. What becomes of it? It falls into the residue. Any lapsed or void gift falls into the residue, and consequently the shares of the attesting witnesses will be divided among all the residuary legatees. But it was said that the residuary legatees cannot take under the first codicil, which directs the money to be divided in accordance with

the provisions of the will without carrying out all these provisions. That appears to me to be a fallacy. It is not, in fact, a case of election at all, they take simply what is given to them by the instrument. The dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, and you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts and fall into the residue and are divisible among them as well as the other residuary legatees.[1]

STUBBS *v.* SARGON.

3 Myl. & Cr. 507. 1838.

THE LORD CHANCELLOR. [LORD COTTENHAM.][2] The second question is, Whether the ultimate devise of the premises in Little Queen Street be void, either under the Statute of Frauds, or for uncertainty. The earnestness with which the point was pressed at the bar by very eminent and learned counsel has induced me to devote more consideration to the subject than I should have thought necessary from any difficulty I have felt upon the point itself. The devise is to trustees to keep in repair the premises, and, subject thereto, to pay the rents to the testatrix's sister, Mary Innell, during her life, and after her decease, in trust to dispose of and divide the same unto and amongst her partners who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit and deem advisable.

She gave her stock in trade to her executors to sell, but with liberty for her partners, or the persons who should be entitled to her freehold premises under her will, to purchase the same at a valuation.

She gave the residue of her personal estate amongst certain of her nephews and nieces; but provided that such of her nephews as should be entitled to any beneficial interest in her freehold premises under her will, should have only one half of the shares of the others.

[1] See *Gibbons* v. *Ward*, 115 Ark. 184; *Brown* v. *Riggin*, 94 Ill. 560; *Shaw* v. *Camp*, 163 Ill. 144; *Manship* v. *Stewart*, 181 Ind. 299; *Barnes* v. *Phillips*, 111 N. E. (Ind.) 419; *Smith* v. *Runkle*, 97 Atl. (N. J.) 296; *Stevens* v. *Myers*, 62 Oreg. 372, 397; *Haynes* v. *Hill*, 1 Rob. Eccl. 795; *Anderson* v. *Anderson*, L. R. 13 Eq. 381; *Green* v. *Tribe*, 9 Ch. D. 231; *In re Trotter*, [1899] 1 Ch. 764.

[2] Only a portion of the opinion is given.

Upon the first head of objection, namely, the Statute of Frauds, it was argued that the will contained no disposition of itself, but that it was a reservation to the testatrix of the power of completing the devise by investing the intended devisee with the character described in the will, and that *Habergham* v. *Vincent*, 2 Ves. Jr. 204; 4 Bro. C. C. 353, was in point in support of that proposition. The difference between the two cases is, that the will in *Habergham* v. *Vincent* contained no devise of the remainder; it only declared that the remainder should be for such persons and for such estates as the testator should, by any deed or instrument attested by two witnesses, appoint. This was no disposition of the property; but a reservation by will, inoperative till the testator's death, of a power to dispose, in his lifetime, of freehold property, by an instrument not attested according to the Statute of Frauds.

In the present case, the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will, and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death — to such children as he might have — or to such servant as he might have in his service at his death. The cases of charging legacies generally by a will, and naming legatees by an unattested instrument, carry this principle to the greatest length, because the subsequent act ascertaining the party to take is also testamentary; but that rule is recognized by Lord Rosslyn in *Habergham* v. *Vincent;* and Sir

W. Grant, in *Rose* v. *Cunynghame*, 12 Ves. 29, — see page 38, — explains it upon the principle I have adverted to. He says the will creates the charge; it is only necessary to show that there is a legacy; for the moment that character is shown to belong to the demand, you show that it is already charged upon the land: and his decision in that case marked the distinction, for the testator did not charge his legacies by his will, and name the legatee by a codicil; but he devised his estate to pay such legacies as he should bequeath to be paid out of his estate; and afterwards, by an unattested codicil, attempted to charge a legacy upon the estate; which Sir W. Grant held he could not do, because, not only is the legatee to be found in the codicil, but the will to make the charge — that not being to be found in the will. I think, therefore, the objection upon the ground of the Statute of Frauds cannot be supported.

Then as to the uncertainty, I think the facts stated in the Master's report clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of whom had been her partners, and others whom she then introduced, and gives to the four stock in trade to the amount of £1,000; and, by circulars, introduces to her former connection these four persons, whom she calls her successors. These certainly are persons to whom she had disposed of her business within the meaning of the will. . . .

APPEAL OF MOORE.

61 N. J. Eq. 616. 1900.

On appeal from the Union county orphans court. On exceptions to an inventory and final account.

Reed, Vice-Ordinary. James Moore died August 14th, 1897, leaving a will, which was probated August 27th, 1897, and letters testamentary issued to James H. Moore, his son and surviving executor.

The will contained the following clause:

"In making division of my property aforesaid as above directed I hereby further direct that certain amounts of money that I have already advanced or may hereafter advance to certain of my children, shall in each case be charged against the portion of each of said children, and be inventoried as part of the estate of which I may die seized, at the full amount of the charge in each instance, but without interest thereon. All such charges are contained in sealed envelopes to be found with this my last will. All other evidence of indebtedness against any of my said children, which I may have at my death, I hereby give and bequeath to such debtors,

respectively, to each child the evidence of his or her indebtedness, and discharge each of said debtors from all his or her obligations in respect to such and all indebtedness for any such advances or debts, except such as I have heretofore specified as being left with this my will.

"These amounts I cannot at present certainly indicate, as they are liable to be changed before my death by payments to be made or by further advances by me."

After the testator's death the executors found the will in a sealed envelope, and with it three other papers, signed by the testator, one of which was in the following form:

"Elizabeth, N. J., February 22d, 1893.

"The sum of $14,000 is to be charged to account of my son Thomas (without interest) for money heretofore advanced by me to him in accordance with the provisions of my will contained in the third section thereof.

"James Moore."

The point taken by Thomas Moore, the exceptant, is that "this paper is an attempt to add to, change or complete the provisions of a will by a subsequent paper not executed with the formalities required by the statute of wills."

There is no doubt that a testator can provide that the amount to be received by a legatee shall be dependent upon a condition of fact to be ascertained *aliunde*. Some of these conditions are noted by Chief-Justice Denio, in his opinion in the leading case of *Langdon* v. *Astor's Executors*, 16 N. Y. 1, 26.

This is so, even though the condition may be brought about by the testator himself. *Stubbs* v. *Sargon*, 3 Myl. & C. 507.

The testator could have provided that all advances made to, or debts owing by, a legatee, whether made or incurred before or after the execution of the will, should be deducted from his portion. Such amount may be ascertained by parol evidence, and may be varied by advancements made subsequent to the execution of the will. 1 Underh. Wills, 447.

A frequent testamentary provision is that such debts or advancements as are charged on testator's books against legatees shall be deducted, and these provisions are valid. *Robert* v. *Corning*, 89 N. Y. 227.

When a testator provides that such advancements as are indicated by entries, to be subsequently made by him, shall be deducted from the share or legacy, a mere entry, it seems, unless there have been advancements in fact, will not suffice. *Hoak* v. *Hoak*, 5 Watts, 80.

Parol evidence is admissible to support the book entries. *Estate of Mussleman*, 5 Watts, 9; *Gilman* v. *Gilman*, 63 N. Y. 41.

In the present case I think it appears that, before the execution of the will, testator had paid to, and for the benefit of, the exceptant moneys, which were never repaid, to an amount in excess of $14,000. It is to this sum that the testator alludes when he speaks of the amounts of money "that I have already advanced." The checks produced, taken in connection with the explanation of the exceptant himself, seems to establish this fact.

It is true, the exceptant says, after admitting advances to the amount of $15,000, that he is equitably entitled to a deduction, because his father promised to make up to him certain commissions for the sale of the Staten Island railroad, if his son would abandon his suit for the same. He does not say that his father promised to make it up to him in any particular manner. It does not appear whether it was to be made up to him by relieving the son from the amount which he (the father) had loaned to the firm of Mason, Peas & Moore and the firm of Peas & Moore, for which sum his son, as a member of the bankrupt firm, was responsible, or whether he was to make it up to him in some other unexplained manner. So I am of the opinion that the testator had the right to regard the $15,000 in money, which the exceptant admittedly received, as money advanced.

Now, the testator having the right to provide that such advances should be charged to the portion of exceptant, the question remains, did he defeat his intention to charge some of the advances by providing that the amount which he intended to charge should be evidenced by a paper made subsequently to the execution of his will?

In my judgment the paper which contained the charge is not to be regarded as testamentary in its character. The effect of the contents of the paper was restrictive. Suppose the testator had said, I charge all the debts owing to me, which I have not discharged or forgiven at the time of my death, and the receipt, release or paper evidencing such discharge will be found with my will. This would seem analogous to a provision containing a gift of certain property, unless it should be conveyed before the testator's death. The fact that he mentioned where such deed or conveyance could be found, if made, would be in no degree material. It being proved that more than $14,000 had been advanced to this legatee, the paper which expressly charged him with only $14,000 was impliedly a gift of the remainder of the advances.

I think that the decree of the orphans court should be affirmed.[1]

[1] See *Dennis* v. *Holsapple*, 148 Ind. 297; *Treadwell* v. *Cordis*, 5 Gray, 341, 352; *Holmes* v. *Coates*, 159 Mass. 226; *Outcalt* v. *Appleby*, 36 N. J. Eq. 73; *Webster* v. *Gray*, 54 Hun 113; *Harris* v. *Harris*, 82 Vt. 199; *Whateley* v. *Spooner*, 3 K. & J. 542; *Re Coyte*, 56 L. T. Rep. N. S. 510.

F. *Competency of Witnesses.*

HOLDFAST d. ANSTEY *v.* DOWSING.

2 Str. 1253. 1746.

EJECTMENT for lands in Cambridgeshire on the demise of Christopher Anstey, D.D., and Mary his wife. And upon a trial at bar the jury found this special verdict.

That James Thompson, Esq., being seised in fee of the premises in question, and of sound mind, signed, sealed, and published a paper writing, purporting to be his last will, dated 10 February, 1742, and which is found *in hæc verba:* by this he declares, that he devises to the defendant the lands in question for life, remainder to his first and every other son and sons in tail male, remainder to his daughters as tenants in common, with a reversion in fee to the right heirs of the devisor: then he charges all his real and personal estate with particular annuities and legacies, and particularly an annuity of £20 *per annum* to Elizabeth the wife of John Hailes for her life and to her separate use; and he also gives a legacy of £10 each to John Hailes and his wife for mourning. That to this will there are three persons who subscribe their names as witnesses, whereof John Hailes is one; and that in their presence, and of nobody else, he signed, sealed, and published the paper writing as and for his last will; and they three attested the same in his presence, and are all three living. They find the identity of John Hailes the legatee and subscriber, and that Elizabeth his wife is still living. That the devisor died May 28, 1743, without issue, and seised as aforesaid; and that Mrs. Anstey (one of the lessors) is his aunt and heir-at-law. They find that before and at the time of the trial the defendant made a tender to John Hailes of £20 for his and his wife's legacies, which he refused to accept, and that those legacies are not discharged. Then they find the entry and demise by the lessors, &c., *sed utrum*, &c.

This cause was three times argued at the bar, and this term the CHIEF JUSTICE delivered the resolution of the court.

The question upon this special verdict is whether in the light Hailes now stands, he is to be considered as a credible witness within the intent of the Statute of Frauds. And we are all of opinion he is not.

The right to devise in this case is not a common law right, it being inconsistent with the notion of a feudal tenure (Wright's Tenures, 174); but it depends upon powers given by Statutes, which must all be considered together, as creating one general parliamentary rule: the particulars of which are, that it must be in writing, signed, and an attestation of three credible witnesses in the presence of the devisor. These were checks introduced to prevent men from being imposed upon; and certainly meant, that the witnesses (who are

required to be credible) should not be such as claim a benefit by the will. Though a will may be read, on proof of all the circumstances by one witness; yet that is upon a supposition, there are two others, who could be allowed to give the same testimony.

If the tender would be equal to the payment of the two money legacies (as it is not) yet the annuity charged upon the estate devised would still subsist; and though it is charged both upon real and personal estate, and the personal (which is not found to be sufficient) would be the first fund, yet it is for Hailes' advantage to enlarge the fund by taking in the real estate; and we must at law consider the husband as benefited by the annuity, though given to her separate use; for it is his money the moment it is paid into her hands, or if not, it eases him in point of maintenance.

It was objected, that nothing vests till the death of the devisor, and therefore at the time of the attestation he had no interest. But the answer is, that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against.

Another way by which it was attempted to be supported is, that it may be void as to the annuity, but good as to the devise to the defendant; which is grounded upon an expression in Carthew's report of the case of *Hilliard* v. *Jennings*, 514, that the will was void, *quoad the devise of lands to the plaintiff*. But whoever reads that will from the record will see, that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands; and it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will.

Consider what a door this would open to fraud: a man has four estates, and is beset by four, who fraudulently procure a will, whereby each has a separate estate devised to him. If one is allowed to be a witness for the other three, they thereby establish it for the whole. In 1 Ld. Raym. 730, it is held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 Mod. 263, the party benefited in one sheet cannot be set up to prove every other sheet.

It was agreed this man could not be examined; how then is he that credible witness that the Statute requires?

The true time for his credibility is the time of attestation; otherwise a subsequent infamy, which the testator knows nothing of, would avoid his will.[1]

And as to what is said in Swinb. 296, it relates only to wills of personal estate, and cannot affect the construction of the Statute.

The Digest, lib. 28, tit. 1, l. 22, *De testibus, subscriptione, et signis*, is express: *Conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*, and so is the Code, lib. 6, tit. 23, l. 1.

[1] In *Pendock* v. *Mackender*, 2 Wils. 18, a will was held void where a witness at the time of execution had been convicted of stealing a sheep. And see *O'Connell* v. *Dow*, 182 Mass. 541, 547.

We therefore hold this not to be a good attestation of a will of lands; and then the title of Mrs. Anstey the lessor of the plaintiff as heir-at-law is not defeated by what is set up as a will; and consequently the plaintiff must have judgment.[1]

[1] "A writ of error was brought in the Exchequer Chamber and there argued, but the cause was compromised before judgment. *Holdfast* v. *Dowsen*, 1 W. Bl. 8, 15 (1747). This case gave rise to the Statute of 25 Geo. II. *c.* 6 (1752), p. (31), *ante*. In *Wyndham* v. *Chetwynd*, 1 W. Bl. 95; s. c. 1 Burr. 414 (1757), it was *held* by Lord Mansfield and the Court of King's Bench on an issue of *devisavit vel non* to try the validity of an alleged will of Mr. Chetwynd, who died in 1750, that attesting witnesses who were creditors at the time of the attestation, but whose debts had been paid off at the time of the trial, were credible witnesses within the Statute of Frauds. The will charged the testator's real estate with the payment of debts.

"In *Doe* d. *Hindson* v. *Kersey* (1765) John Knott, by his will, dated 1734, devised land to six trustees in trust to dispose of the rents and profits to poor orphans, aged and impotent people, within the township of Mauls Meburn, and to put out the children of such poor people apprentices. At the trial of an ejectment, brought by the heir, it appeared that two of the attesting witnesses were trustees, and all three of the witnesses at the time of the attestation, and at the testator's death, were respectively seised of lands in Mauls Meburn, and were assessed to and paid the poor tax there, but that before the trial the witnesses who were named as trustees had released all their interest under the will to the other trustees, and that all the witnesses had conveyed away their said respective lands. On a special case reserved, the Court of Common Pleas held that the will was well attested. Pratt, C. J. (afterwards Lord Camden), dissented in an opinion which was printed in a separate pamphlet, and will be found reprinted at length in 1 Day, 41–88, *note*.

"In *Brograve* v. *Winder*, 2 Ves. Jr. 634, 636 (1795), 'An objection was made to the competency of one of the witnesses to the will, as interested at the time of his examination: but as he had no interest at the execution of the will and the death of the testator, the Lord Chancellor [Lord Loughborough] held him to be a good witness.'" 4 Gray, Cas. on Prop. (2d ed.), p. 148 note.

In the United States the general rule is that attesting witnesses must be competent at the time of attestation. *Bruce* v. *Shuler*, 108 Va. 670; 15 Am. & Eng. Ann. Cas. 889 note; 35 L. R. A. N. S. 686 note. Compare *Will of Delavergne*, 259 Ill. 589. In Pennsylvania no subscribing witnesses are necessary, *Kerns* v. *Soxman*, 16 S. & R. 315; except under certain conditions in devises and legacies in trust for religious and charitable uses, see *Paxon's Estate*, 221 Pa. 98; *Kessler's Estate*, 221 Pa. 314; *Historical Society* v. *Kelker*, 226 Pa. 16; *Stinson's Estate*, 232 Pa. 218; *Carson's Estate*, 244 Pa. 401; *Palethorp's Estate*, 249 Pa. 411. In Tennessee no subscribing witnesses are necessary to a will of personalty. *State* v. *Goodman*, 181 S. W. (Tenn.) 312. For the rule in Maryland as to competency of witnesses, see *Shaffer* v. *Corbett*, 3 H. & McH. 513; *Estep* v. *Morris*, 38 Md. 417.

In *Church of Castine, Appellant*, 91 Me. 416, property was bequeathed to A, and in case A died before the testator then to an attesting witness and to another. The witness was held to be incompetent and the will was not admitted to probate.

In *Crowell* v. *Tuttle*, 218 Mass. 445, the will contained a bequest to a church on condition that the gift be applied to the reduction of a mortgage on the property of the church. A guarantor of the mortgage note witnessed the will. The witness was held incompetent and the whole will invalid, although the amount of the note was greatly exceeded by the value of the mortgaged property, on the ground that the witness "had a direct pecuniary interest in the subject matter of this bequest."

In *Hitchcock* v. *Shaw*, 160 Mass. 140, an inhabitant and taxpayer of a town witnessed a will leaving to the town the interest of a fund to be used each year for the purchase of books for the town library. The witness was held competent. LATHROP, J., said, p. 143, "Even if the town were obliged to raise money for the maintenance of its library, it would be merely conjectural to say that the taxes would be any less on account of

LOUGEE AND ANOTHER, EXECUTORS, *v.* WILKIE AND OTHERS.

209 Mass. 184. 1911.

KNOWLTON, C. J. This is a petition filed in the Probate Court for instructions as to the disposition of the property now remaining in the hands of the petitioners as executors of the will of Martha J. Webster, late of Boston, deceased. By the ninth clause of the will all the residue of the estate is given to such of four persons named, as shall be living at the time of the probate of the will. Of these persons, Katie J. Gerry and Annie E. H. Wilkie were the only ones living at the time referred to. If there were no other provision appearing upon the subject, the residue would be divided equally between them.

The second codicil of the will of the testatrix contains this clause: "All money left by me to my sister Annie E. H. Wilkie shall be held in trust by my Executors the income to be paid her as they think best for her surport the Principle not to be used, unless necessary, all money left her by me after her death shall go to Catharine J. Gerry after her Funeral Expenses are Paid and her name carved on the Monumt and a Marker placed on her grave." Two of the three witnesses to this codicil were Annie E. H. Wilkie and Catharine J. Gerry. The R. L. c. 135, § 3, is as follows: "A beneficial devise or legacy which is made in a will to a subscribing witness thereto, or to the husband or wife of such witness, shall be void unless there are three other competent subscribing witnesses to such will." The question is as to each of two legacies in this clause, whether it is a beneficial legacy within the meaning of the statute. As the legacy to Catharine J. Gerry, no question is made. It is beneficial, and therefore void.

The legacy to Annie E. H. Wilkie is beneficial in its character. It provides for her an income for her support, in the discretion of the executors, including, if need be, the principal sum which it was intended that she should take under the residuary clause when the original will was made. The question arises whether this falls short of being a beneficial legacy because it may be of less value to her than that contained in the original will would be, if that were left to go into effect unchanged. We are of opinion that this legacy

the gift contained in the instrument before us." See also *Cornwell* v. *Isham*, 1 Day (Conn.) 35; *Hawes* v. *Humphrey*, 9 Pick. 350; *Warren* v. *Baxter*, 48 Me. 193.

On the effect of an officer or member of a charitable beneficiary under a will witnessing the will, see *Quinn* v. *Shields*, 62 Iowa, 129; *Will* v. *Sisters of St. Benedict*, 67 Minn. 335; 15 Am. & Eng. Ann. Cas. 794 note; 36 L. R. A. N. S. 504 note.

On the heir as a witness to a will, see *Smalley* v. *Smalley*, 70 Me. 545; *Sparhawk* v. *Sparhawk*, 10 Allen, 155; 1 Woerner, Am. Law Adm. (2d ed.), § 41.

On a blind person as a witness, see *In re Losee's Will*, 34 N. Y. Supp. 1120; *Brown* v. *Skirrow*, [1902] P. 3, 5; an infant as a witness, *Carlton* v. *Carlton*, 40 N. H. 14; *In re Spier's Estate*, 157 N. W. (Neb.) 1014.

is to be considered by itself, without reference to the fact that the testatrix had contemplated her receiving another legacy under a will which had not taken effect, but was revocable at any time prior to the death of the testatrix. This provision purported to give and secure to the legatee something valuable. Whether it was less valuable or more valuable than something else that she might have received if a former will was left unchanged, was immaterial. It was a beneficial legacy which came within the terms of the statute, and was void.

The result is that the provision of the original will remains unchanged by this provision, and the property in the hands of the executors is to be divided between these two legatees in equal shares.[1]

So ordered.

SCOTT ET AL. APPELLANTS *v.* O'CONNOR-COUCH, APPELLEE.

271 Ill. 395. 1916.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:[2]

Application was made to the county court of Knox county to admit to probate an instrument alleged to be the will of Michael O'Connor, deceased. Probate was refused and an appeal was taken by the legatees and devisees under the will to the circuit court. There was a hearing in the circuit court, at which the heirs-at-law contested the application, and probate was again refused and a further appeal was taken to this court.

On January 4, 1913, Michael O'Connor executed an instrument as his last will and testament at the People's Trust and Savings Bank in Galesburg, where he had done considerable business, and he died on May 24, 1914. The attestation clause was in the usual form, containing all the statutory requirements, and it was signed

[1] There was no clause in any of the codicils specifically revoking the will as a whole or the residuary clause in particular. — REP.

Compare *Gurney* v. *Gurney*, 3 Drew. 208; *In re Trotter*, [1899] 1 Ch. 764.

By Stat. 25 Geo. II, c. 6 (1752), *ante*, p. 31. Any beneficial, devise, legacy, estate, gift or appointment, other than charges on land for the payment of debts, to an attesting witness was void, and the witness made competent to testify to the execution of the will. There are similar statutes in many of the United States. See 1 Woerner, Am. Law Adm. (2d ed.), § 41. Under the Statute of Frauds and Stat. 25 Geo. II, c. 6 (1752), a witness to a will of personalty did not lose a legacy. *Emanuel* v. *Constable*, 3 Russ. 436.

In many of the United States by statute one who signs a will as an attesting witness will not lose a legacy or devise to him if there be a sufficient number of competent witnesses without him. *Bruce* v. *Shuler*, 108 Va. 670; 1 Woerner, Am. Law of Adm. (2d ed.), § 41; 35 L. R. A. N. S. 693 note. The rule is otherwise under Stat. 25 Geo. II, c. 6 (1752) and the Wills Act. *Doe* d. *Taylor* v. *Mills*, 1 M. & Rob. 288; *Wigan* v. *Rowland*, 11 Hare, 157. But see *Randfield* v. *Randfield*, 8 H. L. C. 225, 232; *Goods of Sharman*, L. R. 1 P. & D. 661.

[2] Part of the opinion is omitted.

by Nellie Stark and W. H. Pankey as witnesses. Nellie Stark was a stenographer and clerk in the bank and she testified to the execution of the will and that in her opinion the testator was at that time of sound mind and memory. W. H. Pankey was the other subscribing witness, and testified to the execution of the will and that at the time he regarded the testator as of sound mind and memory, but his testimony was stricken out because when the will was executed he was a director and stockholder of the bank appointed executor of the will. The Statute of Wills provides that a will must be attested in the presence of the testator or testatrix by two or more credible witnesses, and that means witnesses who at the time were competent, in law, to testify concerning the subject matter. (*Harp* v. *Parr*, 168 Ill. 459; *Johnson* v. *Johnson*, 187 id. 86.) The test of competency is whether the witness will gain or lose financially as a direct result of the establishing of the instrument as a will. (*O'Brien* v. *Bonfield*, 213 Ill. 428.) Under that rule, a person who is appointed executor by a will is incompetent to attest it as a witness because he will gain the commissions allowed by law if the will is established, and that is a direct financial gain to him, and another person who by virtue of a contract is to share in the fees earned by the executor is equally incompetent. (*Smith* v. *Goodell*, 258 Ill. 145.) The test whether a witness has an interest which disqualifies him, under the act concerning evidence and depositions, to testify against an heir, devisee or legatee, is whether he will immediately gain or lose by the event of the suit or whether the verdict can be given in evidence for or against him in another suit. The interest must be a legal interest in the outcome of the suit and it must be certain, direct and immediate. *Feitl* v. *Chicago City Railway Co.* 211 Ill. 279; *Jones* v. *Abbott*, 235 id. 220; *Ackman* v. *Potter*, 239 id. 578.

Counsel for appellants contend that under these rules Pankey was a competent witness because his interest as a stockholder in the commissions was indirect and not immediate but remote and incidental, and that while there was a possibility of a direct profit to the bank there could be only an indirect profit to Pankey. Counsel for appellee, citing and relying upon cases holding the above rule, contend that Pankey was incompetent because he had an interest which must be direct, legal, immediate and certain and would gain or lose as a result of the suit. That could only be if a beneficial interest was given to him by the terms of the will itself, since he neither had nor claimed any interest in any property disposed of by the will, and had acquired no interest, by contract or otherwise, adverse to the heir-at-law. The question whether a stockholder of a corporation is a competent witness to testify against the representative of a deceased person where the corporation will gain or lose as a result of a suit must be regarded as settled in this court and the position of counsel for appellee must be upheld. Stockholders in a corporation are owners of the income and earnings of the corporation and

directly interested therein, and, as a general rule, unaffected by any special statutory provision, they are incompetent to testify for the benefit of the corporation against an heir-at-law, devisee or legatee. (*Albers Commission Co.* v. *Sessel*, 193 Ill. 153; *Ittner Brick Co.* v. *Ashby*, 198 id. 562; *Cronin* v. *Royal League*, 199 id. 228.) There is, however, a special statutory provision applicable to a witness attesting the execution of a will.

In the revision of 1872 a provision of the Revised Statutes of 1845 was brought forward as section 8 of the Statute of Wills. It removed the incompetency of a witness to the execution of a will to whom any beneficial devise, legacy or interest was made or given by the will, and provided that such witness should be compellable to appear and give testimony on the residue of the will in like manner as if no such devise or bequest had been made, but the devise, legacy or interest was declared to be null and void unless the will had been duly attested by a sufficient number of witnesses exclusive of such person, saving, however, to the witness any share of the testator's estate not exceeding the value of the devise or bequest to which the witness would have been entitled if the will was not established. That section of the Statute of Wills was regarded by this court as remedial and its purpose and effect were explained in *Jones* v. *Grieser*, 238 Ill. 183. In that case W. H. Armstrong and W. J. Sprague were the attesting witnesses of the will of Jeremiah Smith, deceased, and were also named as executors of the will. Upon an application to admit the will to probate the county court held they were not competent as witnesses, but on appeal the circuit court decided they were competent and admitted the will to probate, and this court affirmed the judgment. As to the remedial nature of the statute the court said that it was passed solely with the view to prevent the destruction of a will which would otherwise be a valid will except that the will as executed contained some provision which made its establishment according to the forms of law necessary by the calling of witnesses who took some interest under the will. Concerning the application of the section to particular witnesses and whether their incompetency was removed by the statute, the court said: "If the incompetency of the witnesses existed outside of the fact that the will gave them a beneficial interest in the testator's estate, section 8 of the Wills act does not remove the incompetency of the witnesses to the will. If, however, the incompetency of the witness arises by the act of attesting a will which gives the witness some interest in the testator's estate the statute does apply, and under that section of the statute, while the witness cannot take under the will, nevertheless he may be called and the will established by his evidence." The court said that a person named as executor in a will, who has signed the will as an attesting witness, clearly falls within the section and may be required to give evidence in support of the execution of the will, with the effect, however, that he is barred

from acting as executor or participating in the administration of the estate in any manner.[1] That decision was adhered to and indorsed in *Fearn* v. *Postlethwaite*, 240 Ill. 626, where it was again said that although one named as an executor is not a competent witness to the will, he may be compelled, if his testimony is needed, to abandon his executorship and testify to the execution of the will. That case, however, involved the question of the competency of the wife of the person named as executor, and it was held that her incompetency was not removed by section 8, since nothing was given to her by the will, and, like the wife of a devisee or legatee, she was prohibited from testifying for or against the interest of her husband on ground of public policy.[2]

After the decision in the *Fearn case* the General Assembly, in 1911, amended section 8 by broadening its terms so as to include the wife or husband of any witness to whom any benefit was given by the will, and declaring that on account of the remedial character of the section it should be construed liberally. The section, as amended,

[1] *Murphy* v. *Murphy*, 24 Mo. 526, *accord.* See *Noble* v. *Burnett*, 10 Rich. Law 505 (executor loses commissions); South Carolina, Rev. Stats. (1893), § 1991.

In the following cases the executor was held to be a competent witness and did not lose his office or commissions. *Meyer* v. *Fogg*, 7 Fla. 292, *Hiatt* v. *McColley*, 171 Ind. 91; *Conrades* v. *Heller*, 119 Md. 448; *Sears* v. *Dillingham*, 12 Mass. 358; *Geraghty* v. *Kilroy*, 103 Minn. 286; *Rucker* v. *Lambdin*, 12 Sm. & M. 230; *Cochran* v. *Brown*, 76 N. H. 9; *Matter of Wilson*, 103 N. Y. 374, 376; *Jordan's Estate*, 161 Pa. 393.

On the competency of witnesses who by the will are given employment in the administration of the estate or compensation for services therein, see *Estate of Rehard*, 163 Iowa, 310; *Cochran* v. *Brown*, 76 N. H. 9; *In re Pickett's Will*, 49 Oreg. 127; *In re Pooley*, 40 Ch. D. 1.

A bequest in trust is not invalidated because witnessed by the wife of the trustee. *Cresswell* v. *Cresswell*, L. R. 6. Eq. 69. See *Hogan* v. *Wyman*, 2 Oreg. 302.

Where the beneficiary of a trust is not disclosed on the face of the will, but the trust is of the kind ordinarily enforceable in equity, the beneficiary loses his interest if he attests the will. *In re Fleetwood*, 15 Ch. D. 594. *O'Brien* v. *Condon*, [1905] 1 Ir. Ch. 51, *contra.*

[2] *Piper* v. *Moulton*, 72 Me. 155; *Stewart* v. *Harriman*, 56 N. H. 25; *Will of Lyon*, 96 Wis. 339; *Bettison* v. *Bromley*, 12 East, 250, *contra.*

In *Sullivan* v. *Sullivan*, 106 Mass. 474, under a statute providing that "all beneficial devises, legacies and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to be same," it was contended that a devise to the husband of an attesting witness was void, leaving her a competent witness to the rest of the will. But the court rejected this construction and held the will invalid. To the same effect are *Hodgman* v. *Kittredge*, 67 N. H. 254; *Fisher v. Spence*, 150 Ill. 253; *Fearn* v. *Postlethwaite*, 240 Ill. 626; *Giddings* v. *Turgeon*, 58 Vt. 106. But see *Winslow* v. *Kimball*, 25 Me. 493 (compare *Appeal of Clark*, 95 Atl. (Me.) 516); *Jackson* v. *Durland*, 2 Johns. Cas. 314. Compare *Matter of Hatfield*, 21 Colo. App. 443; *Hawkins* v. *Hawkins*, 54 Iowa, 443; *Lanning* v. *Gay*, 70 Kan. 353; *In re Holt's Will*, 56 Minn. 33; *Lippincott* v. *Wikoff*, 54 N. J. Eq. 107.

A devisee does not lose his devise by marrying an attesting witness after the attestation. *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

By Wills Act, § 15, *ante*, p. 35, it is provided that gifts to the husband or wife of an attesting witness are void, and the witness competent. Similar statutes in many of the United States are referred to in 1 Woerner, Am. Law Adm. (2d ed.), § 41.

is as follows: "If any beneficial devise, legacy or interest shall be made or given in any will, testament, or codicil to any person subscribing such will, testament or codicil, as a witness to the execution thereof, or to the wife or husband of such person, such devise, legacy or interest shall, as to such beneficiary thereof, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses, exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner, as if no such devise or bequest had been made. But if such witness or beneficiary would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness or beneficiary as shall not exceed the value of the said devise or bequest made to him or her as aforesaid. This act being remedial in character shall be construed liberally, and shall apply to cases arising on wills of persons deceased, prior to the adoption of this act, but not finally adjudicated." (Laws of 1911, p. 538.)

Counsel for appellee take the position that the corporation itself, which was named as executor, was not one of the attesting witnesses and hence could not be required to relinquish under the Statute of Wills. The claim is that Pankey being disqualified under the act concerning evidence and depositions because he subscribed as a witness the will that gave him a beneficial interest, the Statute of Wills did not render him competent because the beneficial interest was not given to him but to the corporation. He was an attesting witness to the execution of the will and it gave him a beneficial interest because he was a stockholder of the corporation named as executor, so that he came precisely within the terms of the Statute of Wills. That statute provides that the interest given by the will to the attesting witness shall be null and void and he shall be compellable to appear and give testimony on the residue of the will. The beneficial interest given to Pankey was only because his corporation was named as executor, and the only means by which the beneficial interest could be annulled would be by declaring the provision by which he acquired it null and void. The legislative will that the beneficial interest of an attesting witness shall be null and void can only be made effective as to the stockholder of a corporation by declaring null and void the provision which gives an interest to his corporation.

The court, in *Jones* v. *Grieser*, *supra*, having defined the classes of persons whose incompetency is removed by the statute and confined it to witnesses to whom some beneficial interest in the testator's estate is given by the will, the distinction between such witnesses and those to whom nothing is given by the will must be kept in mind. A case involving the distinction is *Smith* v. *Goodell*, *supra*. In that case one of the witnesses to the will was Frank F. Butzow,

who was a partner in the banking business with Warren S. Goodell and Nathan P. Goodell, who were named as executors and appointed as trustees. Butzow was not named as an executor and the will gave no beneficial interest to him or to the partnership, but there was a private contract between him and his partners by which he was to share in their earnings as executors or in any trust capacity. He derived his interest, not by any of the provisions of the will, but by reason of his relationship with those named as executors. The question of what he might receive was a question solely between him and his partners and was entirely without the control or cognizance of the court in which the estate was being settled. He had at the time of the attestation a present, certain interest of a pecuniary nature in the subject matter concerning which he was called to testify, and by reason of that interest was rendered incompetent to attest the execution of the will. The contract drew into the partnership and gave to Butzow a share of the earnings of executors in no sense connected with the banking business and not given to him, directly or indirectly, by any provision of the will. His incompetency existed outside of the fact that the will gave him any beneficial interest in the estate, and therefore his incompetency was not removed by the statute. In this case the incompetency of Pankey arose from the fact that the will gave a beneficial interest to the corporation of which he was a director and a stockholder, and the beneficial interest to the stockholders was direct, immediate and substantial. Every dollar and every piece of property that comes to a corporation comes directly to the stockholders and increases the value of their stock. In substance, the stockholders, collectively, represented by the artificial corporate entity were executors of the will. The interest of Pankey was derived directly from the will and not through any private contract or arrangement outside of it, and his incompetency arose directly from the beneficial interest given to him and the other stockholders as a corporation. The statute applied, and the court erred in striking out his testimony. The bank being disqualified to act as executor, and therefore having no interest, M. O. Williamson, who was rejected as a witness, was competent to testify generally in the case. . . .

The will and codicil were attested in the manner required by the statute, and the court erred in holding the contrary.

The judgment is reversed and the cause remanded.

Reversed and remanded.[1]

Mr. JUSTICE COOKE, dissenting.

[1] Compare *In re Lecarpentier's Will*, 91 Atl. (Del.) 204.

PEASE *v.* ALLIS.

110 Mass. 157. 1872.

APPEAL by the person named as executor in an instrument purporting to be the will of William S. Allis, from a decree of the Probate Court, disallowing the instrument as the will of William S. Allis. At the hearing, before AMES, J., it appeared that one of the three witnesses to the instrument was the wife of William S. Allis. The judge reported the case for the determination of the full court "upon the question of law involved: if the wife was a competent witness, the will to be admitted to probate; otherwise, the appeal to be dismissed, and the decree of the Probate Court affirmed."

CHAPMAN, C. J. By the Gen. Sts. *c.* 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest. None of our statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. *Davis* v. *Dinwoody*, 4 T. R. 678; *Hatfield* v. *Thorp*, 5 B. & Ald. 589; *Sullivan* v. *Sullivan*, 106 Mass. 474.

As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent.

Decree affirmed.[1]

G. *Attestation.*

LONG *v.* MICKLER.

133 Tenn. 51. 1915.

MR. JUSTICE GREEN delivered the opinion of the court.

This case presents a contest of the validity of the will of R. N. Phillips, deceased. The question submitted is whether it was necessary for the testator to have made known to the subscribing witnesses the nature of the document.

The proof showed that R. N. Phillips lived in Chattanooga at the Mountain City Club. He had been ill and confined to his room for several days, and upon his recovery executed the will in controversy here. He wrote the will himself on the stationery of the club, and signed it. After signing it he took the paper to L. W. Llewellyn, exhibited it, and asked Mr. Llewellyn to witness his signature. The paper was so held or folded by Phillips that no part of its contents could be seen or its character ascertained by Llew-

[1] *Gump* v. *Gowans*, 226 Ill. 635; *Smith* v. *Jones*, 68 Vt. 132, *accord.*

ellyn. Llewellyn demurred to signing the instrument on the ground that he did not like to sign anything without knowing what it was. Phillips replied, "Well, you know that is my signature," and thereupon Llewellyn signed the instrument at the request and in the presence of Phillips as a witness. Phillips then took the paper to W. W. Spotts and requested Spotts to sign it, telling him that it was his (Phillips') will. Spotts thereupon signed the paper as a witness, in Phillips' presence. About a week later Phillips told Llewellyn, the first witness, that the paper the latter had subscribed was his (Phillips') will.

Upon the foregoing testimony being offered, the trial judge directed a verdict in favor of the will, there being no question made upon its validity except the failure of the testator to make publication of its contents to the subscribing witnesses. The Court of Civil Appeals affirmed the judgment below, and we think the action of the two courts was proper.

It was not necessary that either of the witnesses should have seen the testator sign the paper, nor that either should have subscribed it in the presence of the other witness. *Simmons* v. *Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875, and cases cited.

The statute of Tennessee is as follows:

"No last will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of said lands." Shannon's Code, § 3895.

This statute is founded on the section of the statute of frauds relating to wills (29 Car. II, c. 3), which provides that a devise of lands shall be attested and subscribed in the presence of the testator by three or four credible witnesses.

The English courts have always held, construing the statute, that the witnesses need not know the instrument they were attesting was a will. They said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, by what the testator did he must in common understanding and reasonable construction be taken to have acknowledged the instrument to be his will, the attestation thereof would be considered as complete. *White* v. *British Museum*, 6 Bing. 310; *Ellis* v. *Smith*, 1 Ves. Jr. 11; *Wright* v. *Wright*, 7 Bing. 457.

In his work on wills, Mr. Underhill points out that in some of the states of the American Union the English statute referred to has been re-enacted with the additional requirement that the testator must declare the instrument to be his will in the presence of the attesting witnesses. But he states that in those jurisdictions where the English statute of frauds has been re-enacted without

the additional requirement for publication the witnesses need not know the instrument which they attest is a will.

"For," he says, "the law requires a subscription by witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses." Underhill on Wills section 180, and section 202.

The Supreme Court of Massachusetts has said:

"This will was in writing, signed by the testator, and attested and subscribed in his presence by three competent witnesses. It was written by the testator. He knew, therefore, if of sound mind, what he signed, and what he asked the witnesses to attest. The calling upon witnesses to attest his execution of an instrument, whose character and contents he well knew, was in effect a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character and contents of the instrument were not disclosed to them. It was as if the testator had said: 'This instrument is my act; it expresses my wishes and purposes; and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence.' We think all the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents, or of its nature, is in terms required. The legislatures have prescribed certain solemnities, to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses, what is in the will, or even that it is a will." *Osborn* v. *Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155.

The law seems to be well settled that unless publication of the contents of the will to the subscribing witnesses is required by statute, it is unnecessary, and such witnesses need not be informed of the character of the document at the time they subscribe their names as witnesses. See *In re Claflin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261; *Scott* v. *Hawk*, 107 Iowa, 723, 77 N. W. 467, 70 Am. St. Rep. 228; *Watson* v. *Pipes*, 32 Miss. 451. See, also, 40 Cyc. 1116, 1117, and cases cited.

The judgment of the Court of Civil Appeals will be affirmed. [1]

[1] Compare *Ellis* v. *Smith*, 1 Ves. Jr. 11.

Publication is necessary by statute in some of the United States. *Matter of Van Handlyn*, 83 N. J. Eq. 290; *Lewis* v. *Lewis*, 11 N. Y. 220; 1 Woerner Am. Law Adm. (2d ed.), § 40.

NUNN *v.* EHLERT.

218 Mass. 471. 1914.

LORING, J. This appeal from a decree of the Probate Court comes before us upon a report by a single justice of this court[1] which sets forth all the evidence introduced before him. The single justice found that the testimony of each subscribing witness was "entirely credible and not open to doubt," and made a finding that the instrument was properly executed and that it ought to be admitted to probate as the will of Thomas Nunn. By the terms of the report, if the finding was wrong the decree of the Probate Court (disallowing the will) is to be affirmed. But, if the finding is sustained, that decree is to be reversed and a decree entered admitting the instrument to probate.

A facsimile of the will is made part of the report. The will was written on ordinary foolscap paper, that is to say, on paper folded at the top and with lines ruled upon it. The whole paper is in the handwriting of the deceased. A copy of the ending of it is set forth in the footnote.[2] The *in testimonium* clause begins at the foot of the first page and ends on the second line of the second page. The attestation clause begins on the next line and fills five lines and a part of the sixth line. On the next line below and on the right hand side of that line occur the words "Signed. Thomas Nunn." On the three lines next below that line and on the left hand side of those lines are the names, "Mrs. Mary E. Marshall, John Marshall, Thomas G. Andrews." On the same line with "Thomas G. Andrews" and on the right hand side of that line are the words "Thomas Nunn."

According to Mrs. Marshall's testimony it appeared that a few days before she and her husband signed the instrument here in question the deceased had asked her if she and her husband would sign his will; that later on, he came into their kitchen and took the will out of his pocket; that "it was folded up"; that as he turned it over she saw handwriting on it and recognized the writing as the writing of the deceased, but could not "recognize any word"; that

[1] BRALEY, J.

[2] "In testimony whereof I hereunto set my hand in the presence of three witnesses declare this to be my last will and testament, this first day of March A.D. 1908 Thomas Nunn of Malden in the said Commonwealth.

"On this first day of March 1908. Thomas Nunn of Malden in said Commonwealth, sign the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three at his request and in his presence hereto subscribe our names:

Signed. Thomas Nunn

Mrs. Mary E. Marshall.
John Marshall.
Thomas G. Andrews

Thomas Nunn."

they were sitting on opposite sides of a table, and the deceased "reached" the folded paper across to her and she signed; that he held on to the paper while she signed; that it was folded "just so I could sign comfortably," and so that she saw nothing above where she put her name. She saw no signature below the edge made by the folding of the paper. She further testified that she then got up out of the chair in which she sat while signing her name; that her husband sat down and signed his name, and that the deceased held on to the paper folded as above described until both had signed. He then blotted the signatures, put the paper in his pocket and went away. She further testified that when she caught sight of the writing while the paper was being turned over she did not distinguish any words or see any signature. This testimony was corroborated by that of her husband. He was explicit in his testimony that no change was made in the arrangement of the paper while his wife and he signed, and that the deceased did not point to any signature in the will. In his testimony he said, "I don't remember of seeing any signature." It should be added that after his death the instrument now presented as the will of the deceased was found in his box in a safety deposit vault.

This case, therefore, presents the question whether a will is duly attested when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will.

Our Statute of Wills (in substance a re-enactment of the Statute of Frauds, St. 29 Car. II, c. 3, § 5) is in these words: "Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal," with some additions not necessary to be stated. R. L. c. 135, § 1.

In *Chase* v. *Kittredge*, 11 Allen, 49, 63, a statement was made of the meaning of the word "attested" in what is now R. L. c. 135, § 1. The decision in *Chase* v. *Kittredge* was that a subscribing witness cannot sign before the testator has signed. In making that decision Mr. Justice Gray delivered an exhaustive opinion upon the acts required by statute to make a valid will. In the course of that opinion he said: "The statute not only requires them (the witnesses) to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator's death the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has

made it his written will." Chief Justice Robertson gave a similar definition of the word "attest" in *Swift* v. *Wiley*, 1 B. Mon. 114, 117. He said: "To attest the publication of a paper, as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication: but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification." See in this connection *Reed* v. *Watson*, 27 Ind. 443, 447; *Gerrish* v. *Nason*, 22 Maine, 438, 441; *Brooks* v. *Barrett*, 7 Pick. 94, 98.

If, however, the matter were *res integra*, the conclusion reached in the cases cited above would be the conclusion which would have to be reached by a due construction of the Statute of Wills. R. L. c. 135, § 1. The statute requires that the deceased shall be a person of full age and sound mind, that his will shall be reduced to writing, and that the writing shall be signed by him (or by a person in his presence and by his express direction), and that it shall be "attested and subscribed in his presence by three or more competent witnesses." The subscription of the paper by the witnesses identifies the instrument. What then does the statute mean when it requires in addition that the instrument shall be "attested" by the witnesses? To attest means to bear witness. When the statute requires that the witnesses shall attest, what is it that they are to bear witness to? Plainly to those facts to which they have to testify when put on the stand as attesting witnesses, namely, that those things existed and were done which the statute requires must exist and be done to make the writing a valid will. The rule that the will must be proved by the attesting witnesses, if they can be produced (as to which see *Chase* v. *Lincoln*, 3 Mass. 236; *O'Connell* v. *Dow*, 182 Mass. 541), is founded on this assumption. In *Chase* v. *Lincoln*, *ubi supra*, this court said at page 237: "The Legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the three witnesses, to be given to the jury. They must therefore all be produced, if living, and under the power of the court."

Taken literally, R. L. c. 135, § 1, requires that the instrument in writing shall be "signed" by the deceased (or by a person in his presence and by his express direction), in the presence of the witnesses. But as matter of construction it was early established that an acknowledgment by the deceased in the presence of the witnesses of a previous signature was equivalent to signing the instrument in their presence. Chief Justice Shaw, in his charge to the jury

in *Hall* v. *Hall*, set forth in 17 Pick. 373, 375 (and quoted in full on this point later on in this opinion), made a statement in substance to that effect. In *Dewey* v. *Dewey*, 1 Met. 349, 352, Mr. Justice Dewey said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient." Gray, J., in *Chase* v. *Kittredge*, *ubi supra*, said: "The statute requires that the will shall 'be in writing and signed by the testator,' and shall be 'attested and subscribed, in the presence of the testator, by three or more competent witnesses.' He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it." And the law is settled to the same effect in other jurisdictions. A collection of cases may be found in a note in 38 L. R. A. (N. S.) 164.

It may be taken to be settled, therefore, first, that the attestation required by R. L. c. 135, § 1, consists in the witnesses seeing that those things exist and are done which the statute requires must exist or be done to make the written instrument in law the will of the deceased; second, that although the act required by R. L. c. 135, § 1, is that the will shall be "signed" by the deceased, yet as matter of construction an acknowledgment by the deceased of a previous signature, made in the presence of the attesting witnesses, is equivalent to signing in their presence.

With these two propositions established we come to the question presented in the case at bar, namely: Is there an acknowledgment by the deceased of a previous signature where the signature at the time is hidden from the witnesses? Chief Justice Shaw put that (the case of a hidden signature) as an example of an instance where without question there was not an acknowledgment by the deceased of his signature. In his charge to the jury, set forth in *Hall* v. *Hall*, 17 Pick. 373, 375, already referred to, he said: "That to maintain the issue on the part of the executor, and to establish the will, it was necessary to prove that the testatrix signed the will in presence of the witnesses; or that she acknowledged the signature as hers in their presence; and that they severally signed it as witnesses in her presence; and that such acknowledgment was a sufficient compliance with the statute. But in the latter case such acknowledgment may be shown, either by proof of an express acknowledgment and declaration that the signature to the will is hers, or by such facts as will satisfy the jury, that she intended to make such declaration or recognition of her signature. If a mere reference is made

to a paper, especially if produced by another person, and not held in her own custody, or if it is folded up, and there is no pointing to or referring to the signature, if she publishes, declares and acknowledges such document to be her will, this is not such an acknowledgment of the signature as will supersede the necessity of an actual signature in the presence of the witnesses, and will not warrant the jury in finding that it was duly signed in the presence of the witnesses." And the law is settled in accordance with this view in England (*Hudson* v. *Parker*, 1 Rob. (Eccl.) 14; *Blake* v. *Blake*, 7 P. D. 102); in New York (*In re Will of Mackay*, 110 N. Y. 611; *In re Laudy*, 148 N. Y. 403); in Minnesota (*Tobin* v. *Haack*, 79 Minn. 101); and in Oregon (*Richardson* v. *Orth*, 40 Ore. 252). An opposite conclusion was reached in *In re Dougherty's Estate*, 168 Mich. 281.

Apart from authority it is manifest that a person does not acknowledge a signature to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed. While an acknowledgment of a signature then exhibited to the witnesses is equivalent to signing in their presence, an acknowledgment to the witnesses of the fact that a signature has been made is not the equivalent of signing in their presence. It follows that where the signature is hidden there is not the equivalent of the statutory requirement that the writing shall be "signed" in the presence of the attesting witnesses.

It is true that *Hudson* v. *Parker*, 1 Rob. (Eccl.) 14, and *Blake* v. *Blake*, 7 P. D. 102, were decided under St. 1 Vict. c. 26, § 9, which in terms requires that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses." But it is of no consequence whether the conclusion (that the signature must be made by the testator in the presence of the witnesses or acknowledged by him in their presence) is reached as matter of construction (as in R. L. c. 135, § 1) or as matter of express enactment (as it is under 1 Vict. c. 26, § 9). The conclusion, however reached, being the same, cases in both jurisdictions are equally in point.

It is the contention of the proponent that however this question might have been decided if the matter had been *res integra*, the point is concluded by the case of *Dewey* v. *Dewey*, 1 Met. 349. It will be necessary to examine that case with some particularity. The instrument propounded in that case as the will of the deceased (Timothy Dewey by name) was subscribed by Medad Fowler, Josiah Fowler and Silas Root as witnesses. There was no question as to the sufficiency of the attestation on the part of Silas Root. The question presented in that case was that of the sufficiency of the attestation by Medad and Josiah Fowler. Medad Fowler testified that his name, which was upon the will, "appeared to be his handwriting, but that he had 'no recollection anything about it.'" His

son, Josiah Fowler, testified that the deceased asked him and his father to sign a paper which he called his will, "and not to read it." He "thought he did not see . . . Timothy sign it; but the deponent and his father signed it as witnesses, without reading it. Deponent did not recollect seeing a word of writing on the paper, which he 'thought,' at the time, was not right, or as it should be." At the trial, after the testimony of the subscribing witnesses had been given, the case was taken from the jury and by agreement of the parties was left to the determination of the full court. The opinion begins in these words: "The only question raised in this case is whether this will was duly attested," and ends with these: "It seems to us, upon the whole evidence, that the will was duly signed by the testator, and being thus signed, he by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of it to authorize the three witnesses to attest and subscribe the same as witnesses thereto, in accordance with the provisions of the statute."

There was no suggestion that the signature of the deceased was hidden from Medad and Josiah Fowler when they subscribed the will as witnesses. The case at bar, therefore, is not concluded by the decision made in *Dewey* v. *Dewey*. Not only is that true, but there is nothing in the opinion which is decisive of this case. When Mr. Justice Dewey said that the deceased "by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of" the will, he must be taken to have meant that the deceased, by his acts, if not by his declarations, sufficiently recognized and acknowledged the previous signature made by him. In an earlier part of his opinion Mr. Justice Dewey had said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient. *Stonehouse* v. *Evelyn*, 3 P. Wms. 252, 254. *Grayson* v. *Atkinson*, 2 Ves. Sen. 454, 456. So a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to authorize their attestation to it, and to make it a good will." A declaration by the testator that a paper bearing his signature then exhibited to the witnesses is his will is a sufficient acknowledgment of the signature to authorize the attestation of the will. That was the case to which Mr. Justice Dewey's statement was addressed. Whether such a declaration will be sufficient if the signature was hidden from the witnesses was not before the court in *Dewey* v. *Dewey;* and what was said there cannot be taken to have been said with reference to such a case.

There is one point on which the decision in *Dewey* v. *Dewey* is not clear, and that is the view which the court should be held to have taken with respect to the testimony of Josiah Fowler. Josiah

Fowler did not testify that he did not see the signature of the deceased when he and his father signed as subscribing witnesses. What he did testify to was that he "did not recollect seeing a word of writing on the paper." The distinction is plain. As Mr. Justice Dewey said on pages 353 and 354: "The question is not whether this witness [he was then speaking of Medad Fowler] now recollects the circumstance of the attestation, and can state it as a matter within his memory. . . . The real question is, whether the witness did in fact properly attest it [the will]." It is what was done in fact which is to be looked to in determining whether the attestation is good or not. Testimony of a witness given at the time that the instrument is offered for probate that he does not recollect that a certain act was done, is a different thing from testimony that that act was not done. In *Dewey* v. *Dewey* the full court were finding the facts as well as ruling upon the law. Whether they intended to find that, although Josiah Fowler did not recollect seeing the signature of the deceased, that signature was seen by him and his father, Medad Fowler, or whether the full court meant to find that the signature was not in fact seen by either of them, is not clear. Of these two it is not necessary to determine which is to be taken to have been the view of the court in *Dewey* v. *Dewey*. Whichever is the true view of that opinion it is not decisive of the question which has to be decided here. The court could have found that Medad and Josiah saw the signature of the deceased but did not recollect that fact when they testified; or, if they found that Medad and Josiah did not see it, there is authority for the proposition that where the testator exhibits his signature to the witnesses and asks them to subscribe their names as witnesses the attestation is valid because he has in fact acknowledged his signature to those witnesses, even though the witnesses did not in fact see it. In such a case he has exhibited his signature to them, and that, coupled with a request that they should sign as witnesses, is an acknowledgment of his signature. In such a case it is not necessary that the signature exhibited to them by the testator should have been seen by the witnesses. That was the ground on which *Blake* v. *Blake*, 7 P. D. 102, was decided by the Court of Appeals in 1882. It was there said that it is enough that the signature which was acknowledged could have been seen by the witnesses. That is vital. Whether it was in fact seen by them is not a matter which is decisive.

[The learned judge then examined and distinguished *Ela* v. *Edwards*, 16 Gray 91, and *Meads* v. *Earle*, 205 Mass. 553. He continued as follows: — Ed.]

The proponent also has relied upon *Gould* v. *Chicago Theological Seminary*, 189 Ill. 282. That was a case where the attestation was held valid although the previous signature of the deceased was hidden from the subscribing witnesses when the deceased asked them to sign, saying that the paper was his will. But the Illinois act (Ill.

Rev. Sts. c. 148, § 2) does not provide that the testator shall acknowledge a previous signature. The Illinois act provides that the attesting witnesses must declare on oath "that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed." It was held as matter of construction of that statute that what is to be acknowledged by the deceased is that the paper signed by the subscribing witnesses is his will.

It is hard to understand what the attestation of a will consists in if the contention of the proponent is right. The subscription of the witnesses identifies the paper. But the statute in requiring that the will must be "attested" means that something more must be done than the identification of the paper by the subscribing of the witnesses. It cannot be that the requirement that the will should be "attested" means that the testator shall inform the witnesses that the paper is his will. The contrary is settled law, at least in this Commonwealth. *Hogan* v. *Grosvenor*, 10 Met. 54. *Osborn* v. *Cook*, 11 Cush. 532. *Tilden* v. *Tilden*, 13 Gray, 110. If the subscribing witnesses need not know that the paper subscribed by them is the will of the deceased it is hard to understand what is required by the word "attested" in addition to the word "subscribed," if the definition of "attested" given in *Chase* v. *Kittredge* and the other cases cited above is not correct. On this point the argument of the proponent has given us no aid.

It follows that when the deceased hides from the subscribing witnesses the signature which is upon the instrument previously signed by him and goes no further than to ask the subscribing witnesses to sign the paper placed before them, even if that request be accompanied by a statement that the paper is his will, there is no acknowledgement by the deceased of his signature and so no valid attestation of his signature by the subscribing witnesses. All that is acknowledged by the deceased in that case is that the paper is his will. In such a case there is no acknowledgment by the deceased that the signature on the paper (if there be a signature upon it) is his signature. We are of opinion that the charge of Chief Justice Shaw in *Hall* v. *Hall*, 17 Pick. 373, set forth above, and the decisions made in *Hudson* v. *Parker*, 1 Rob. (Eccl.) 14, *Blake* v. *Blake*, 7 P. D. 102, *In re Will of Mackay*, 110 N. Y. 611, *In re Laudy*, 148 N. Y. 403, *Tobin* v. *Haack*, 79 Minn. 101, and *Richardson* v. *Orth*, 49 Ore. 252, are correct. It follows that there was no valid attestation of the will of Thomas Nunn in the case at bar.

It is undoubtedly the fact that Thomas Nunn thought that he had made his will, and it is a matter of regret, under these circumstances, to have to come to the conclusion that the paper which he signed, thinking that it was his will, is not in law his will. But that regret arises in every case in which a deceased person has failed to comply with those requirements, which, as a matter of public policy,

the Legislature has thought proper to exact in case a person wishes to dispose of his property by will. The Legislature might have provided (as it has been held that the Legislature of Illinois did provide) that if the paper was signed by the deceased it would be enough if he acknowledged it to be his will in the presence of the persons who signed the paper as witnesses. But that is not the provision which was adopted in R. L. c. 135, § 1, and the earlier acts of which this is the re-enactment.

It follows that by the terms of the report the decree of the Probate Court must be affirmed. It is

So ordered.[1]

IN RE GOODS OF GUNSTAN.

7 P. D. 102. 1882.

JESSEL, M. R.[2] I regret that I am unable to come to the conclusion that this will was properly executed. I say I regret, because from a mere accident, a want of form, that which was clearly the last will of this lady must fail of effect, and the persons interested under it be disappointed.

The real question is, what the law requires to be proved in order to support a will so that it shall be validly executed.

In this case it does not appear that the testatrix signed her name to this document in the presence of the witnesses. I invited the counsel for the appellant to argue the question upon the basis of these witnesses having seen the lady sign her name, but I agree that Dr. Deane knew more of the case than I did, and was wise in declining to argue it on that footing, for on careful examination of the evidence in this case I think it is clear that this will was not signed in the presence of either witness; it is evident that the signature took place before they came into the room. The question, then, arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment under the Statute? What I take to be the law is correctly laid down in Jarman on Wills, 4th ed. p. 108, in the following terms: "There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will"; and I may add, in my opinion, it is not sufficient even if the testator were to say, "My signature is inside the paper," unless the witnesses were able to see the signature. There is a great deal of authority on this point, several cases are referred to in the note to the passage which

[1] *In re Dougherty's Estate*, 168 Mich. 281, *contra*. And see *Gould* v. *Theological Seminary*, 189 Ill. 282; *White* v. *Trustees of British Museum*, 6 Bing. 310.

[2] The statement of facts, the opinion below, and the concurring opinions on appeal of BRETT, L. J., and HOLKER, L. J., are omitted.

I have read, but I think it is sufficient to mention three cases only. The first is *Hudson* v. *Parker*, where, 1 Rob. 25, the matter is most elaborately discussed by Dr. Lushington. He tells us what in his view is the plain meaning of acknowledging a signature in the presence of witnesses; he says, "What do the words import but this? 'Here is my name written, I acknowledge that name so written to have been written by me; bear witness.' How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there *and seen* at the time; for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning, acknowledgment, and approbation."

Now I have to consider the case of *Beckett* v. *Howe*, Law Rep. 2 P. & D. 1, where a different rule was laid down by Lord Penzance. At page 5 he says, "The doctrine of *Gwillim* v. *Gwillim*, 3 Sw. & Tr. 200; 29 L. J. (Pro.) 31, is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will and his signature is there at the time, it is sufficient." I dissent from the proposition of Lord Penzance, and agree with the ruling of Dr. Lushington, and therefore I hold that it is not sufficient to say "This is my will." The argument that that will do is founded on the notion that the statement by the testator "This is my will" implies that his signature is affixed to it; but that is not so, a will is not a valid will until it is attested, and there is no necessary implication that it already bears the testator's signature. It may be that the testator has not yet signed it, but may intend to do it, and it is quite possible that he may in that sense call it a will, inasmuch as it will, when executed, be a will. But I say that if he had distinctly said that he had signed the will, but yet the witnesses would not be able to see his signature, that is not a sufficient acknowledgment. Is there any doctrine to the contrary? Lord Penzance does not, to my mind, lay down any new doctrine; he thought himself bound by the decision of Sir Cresswell Cresswell in *Gwillim* v. *Gwillim*. I will now turn to that case, and with great deference to Lord Penzance, I do not think

Sir C. Cresswell laid down such a doctrine. I agree people may, in reading the decision, as I am bound so to say, considering that Lord Penzance so read it, come to the same conclusion as he did, but I think that Sir C. Cresswell did not decide or intend to decide anything of the kind. In *Gwillim* v. *Gwillim*, the signature of the testator (as printed in the report) is placed immediately above the signature of the witnesses. If nothing was put upon the signature it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the argument therefore turned upon the question whether the signature was there or not. The present question was not under discussion. The material part of the judgment is on page 205, "I am therefore at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, 'My will and testament, 1856, March 31st.' Under that comes 'Brange, Mar. 31, 1856,' that being the time and place at which the old ladies say they were asked to sign the will. Under that comes 'John Gwillim,' and then the word 'witness' a little below on the left hand side where one would expect to find it. I cannot, therefore, but think that the name of the testator was written at that time, and that by asking these old ladies to witness his will he did acknowledge his signature."

Now that I say is *Hudson* v. *Parker*, 1 Rob. 14. The witnesses were taken to have seen the signature, and the testator having then asked them to witness his will, he was held to have acknowledged his signature. I cannot find one word in the judgment to show that Sir C. Cresswell was of opinion that if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson* v. *Parker*. The existence of any such doctrine rests entirely on the statement of Lord Penzance in *Beckett* v. *Howe;* and as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett* v. *Howe* is no authority.

If that is so, there is only one other point, and that is, did the witnesses see the signature? I am of opinion upon the evidence that they did not. Susan Harradine says in express terms that she did not; that there was a piece of blotting-paper over the signature. I have looked carefully at the original writing, and the appearance of the document strongly confirms this statement of the witness. The words, including the signature of the testatrix, are dull and blurred as if they had been blotted, and it would appear as if the

blotting-paper reached down below the signature of the testatrix. The other witness says the same thing in the first instance, and then subsequently that she sometimes thought that she did see the signature, but she could not say whether she did or not. I must upon this evidence come to the conclusion that it is most satisfactorily, or rather most unsatisfactorily, proved that these witnesses did not see the signature.

I refrain from going into the next question whether sufficient expressions were used by the testatrix as to the document being her will. If it were necessary I should take more pains to consider the meaning of the words used; but I think it is unnecessary to do so on the present occasion, having regard to the conclusion of fact that the witnesses did not see the signature of the lady, and the decision of the learned President pronouncing against the will must be affirmed.

Appeal dismissed, but under the circumstances costs of all parties ordered to be paid out of the estate.[1]

MOORE *v.* KING.

3 Curt. Eccl. 243. 1842.

ROBERT KING died on the 16th of August, 1842. By his will, dated the 22d of March, 1841, he appointed C. H. Moore, and his brother E. R. King to be his executors, and named his said brother his residuary legatee.

On the 8th of August, 1842, the deceased, being confined to his bed by illness, requested his sister, Mrs. Coape, to bring him materials for writing, and upon her doing so, he wrote a codicil (A) in the presence of Mrs. Coape, and she, at his request, subscribed her name thereto in his presence; no other witness was present at the time.

On the 8th of August, 1842, Sir D. Davies, the medical attendant of the deceased, paid him a visit, on which occasion the deceased requested Mrs. Coape to give him the paper (A), and showing the same to Sir D. Davies, said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper; you will oblige me if you will also add your signature, two witnesses being necessary." Sir D. Davies thereupon placed the paper on a chest of drawers by the bedside of the deceased, and subscribed his

[1] *Matter of Mackay*, 110 N. Y. 611, *accord*.

Under statutes similar to the Wills Act, § 9, *ante*, p. 34, if the testator acknowledges to the witnesses that the instrument is his, and his signature thereon is visible, the attestation is good, even though the witnesses did not actually see his signature. *In re Carll's Will*, 77 N. Y. Supp. 1036; *Daintree* v. *Fasulo*, 13 P. D. 67; *Wright* v. *Sanderson*, 9 P. D. 149. And see *Matter of Laudy*, 161 N. Y. 429; *In re Nussbaum's Estate*, 144 N. Y. Supp. 443.

name thereto; Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

On the 7th of November, 1842, the court was moved to admit this paper (A) to probate, the court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King the other executor and residuary legatee.

SIR HERBERT JENNER-FUST. The question before the court is one of great importance with regard to the construction of the Will Act (1 Vict. *c.* 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the court is to find its way to a due and proper construction of the whole of the Act; not of one single isolated clause, but of the entire intention of the Legislature in passing the Act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the court, but only on *ex parte* motion; unfortunately they were cases, where the property involved in the decision was so small, as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the *Case of Allen*, 2 Curt. 331, the paper was attested by the one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The court was of opinion that the execution was not sufficient. The other case of *In re Simmonds*, 3 Curt. 79, was very similar. In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand, that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses? It has been argued, under the present Statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute of Frauds, it is not sufficient under the altered language of the present Act; on the other side, it has been said, that a construction is to be put on this Act the same as if on the Statute of Frauds; but it must be remembered, that the doubts, expressed by judges of courts of law and equity on the Statute of Frauds, led to the introduction of the present Act. It has been well said, that the

1 Vict. *c.* 26 is not an original Act, but an Act to amend a former law; so it is, — it is an Act to amend a former law, for removing all doubts whatever existing with regard to that law, and I find in the 9th section of the new Act a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds. The language of the 9th section of 1 Vict. is expressly prohibitory, "No will shall be valid unless it be in writing, and signed at the foot or end thereof," — clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator's name at the beginning of the will; — "and such signature shall be made or acknowledged by the testator," — it had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again, all doubt is removed by the present section. Under the Statute of Frauds it had been held, that the witnesses need not be all present at the same time, the signature might be acknowledged to the three or more witnesses at different times; — again, by the present Act, all doubt on that point is removed, the witnesses must be present "at the same time." Now when I clearly find, that the object of this Act is to remove every possible doubt, — thereby taking away all latitude and discretion in its interpretation, — and that it expressly provides that the two witnesses, who *are to be present at the same time*, shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her signature on a subsequent day? I am inclined to think that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made and acknowledged to them when *both* are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The Act says the testator may *acknowledge* his signature, but does not say that the witnesses may acknowledge their subscriptions. I reject the allegation.[1]

HINDMARSH, Appellant, *v.* CHARLTON, Respondent.

8 H. L. C. 160. 1861.

The respondent had instituted a suit in the Probate Court against the present appellant, for the purpose of obtaining letters of administration of the personal estate of Joseph Hindmarsh, deceased,

[1] In the absence of a specific requirement of the statute the witnesses need not sign in the presence of each other. *Roberts* v. *Welch*, 46 Vt. 164; *Parramore* v. *Taylor*, 11 Gratt, 220, 253–255; 1 Woerner, Am. Law Adm. (2d ed), § 40.

who died on the 26th December, 1857, leaving her, his sister (married to Thomas Charlton) his next of kin. She alleged that her brother died intestate. The appellant pleaded that the brother did not die intestate, but on the 17th of December, 1857, made and duly executed a will, under which the appellant claimed as residuary legatee. The parties being thus at issue, the Court of Probate made an order for trial, and the issue came on for trial at the Durham Spring Assizes in 1859, before Mr. JUSTICE BYLES; when, under the direction of the learned judge, the jury returned a verdict for the defendant, declaring the will to have been duly executed, but leave was reserved to the Court of Probate to enter the verdict for the plaintiff in the suit, that court being at liberty to draw inferences of fact, if it should think fit to do so. A motion for that purpose was accordingly made before the Judge Ordinary. The notes of the evidence taken at the trial were furnished by Mr. JUSTICE BYLES, and were to the following effect: Dr. Blair White, a physician at Newcastle, said, "I attended Joseph Hindmarsh. On the 17th December, 1857, I went into Hindmarsh's bedroom; two papers were produced by the housekeeper in the presence of Hindmarsh. Mr. Wilson, the other medical attendant, was present. I gave the papers into Hindmarsh's hands, and asked, if that was his signature. Hindmarsh put on his spectacles, examined the paper and the signature, and said, 'Most decidedly this is my handwriting, and this is my will.' This was in the presence of Mr. Wilson and myself. I took the will from Hindmarsh's hand and signed it in that room. I remember Mr. Wilson signing the date, because I requested him to do so." Mr. Frederick William Napoleon Wilson, surgeon, said, "On the forenoon of the 17th December, 1857, I saw Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out, both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament and signature,' and then my name, 'Fred. Wm. Nap. Wilson,' on both papers. In the afternoon, Dr. White came. In the room Dr. White examined the patient as to his health. The doctor and I then went into the other room, where we had a consultation. I had suggested to Hindmarsh before we left the room, that he had better have another witness. Dr. White took the will in his hand, and we went back to the room where Hindmarsh was. Dr. White asked Hindmarsh if that was his will. He said, 'Well, I can't see very well, get me my spectacles.' The housekeeper gave him his spectacles, and he sat up in the bed, and looked at the paper, and said, 'Yes, that is my will, and this is my signature.' At a small table, at the head of the bed, and close to the bed, Dr. White signed his name. After he had signed it, I took the papers and went across to the window, where there was another table, and sat down in an arm-chair; and then, after some conversation about the date being added, I distinctly remember retouching my name, by putting a

cross on the *F* on the paper which is uppermost, and then I added the date in both wills, and then, I believe, the documents were both given to the housekeeper." On cross-examination, he said, "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was merely in pursuance of my habit. . . . I thought it was better to complete the name. I thought adding the date was equal to a repetition of the signature. I think I had no other intention. It was by the date I intended to repeat my signature. My sole object was to supply the omission, to make the name complete. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make the signature of the morning complete."

The cause was heard before the Judge Ordinary, and on the 18th May, 1858, judgment was pronounced in favor of the plaintiff in the suit, on the ground that the facts proved did not amount to a due attestation of the will according to the provisions of the 1 Vict. *c.* 26. The verdict for the defendant was, therefore, ordered to be set aside, and a verdict entered for the plaintiff. This was an appeal against that decision.

THE LORD CHANCELLOR. [LORD CAMPBELL.][1] My Lords, these are very distressing cases for judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties *bona fide* made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion. Having heard the case very lucidly and ably argued on both sides, I am of opinion that the learned judge of the court below came to a right conclusion in holding that this will was not made in accordance with the requirements of the Legislature.

The Act of the 1 Vict. *c.* 26, § 9, requires that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator." It is settled by the case of *White* v. *The British Museum*, 6 Bing. 310, and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. The question in this case is, whether that which took place was a subscription of the witnesses, whose subscription is in question, or not. I will lay down this as my notion of the law: that to make a valid subscription

[1] The concurring opinion of LORD CRANWORTH is omitted.

of a witness, there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter *F* in the same manner as if he had perfected the letter *i* by putting a dot over it, which he had not dotted in the morning. Now, can that be considered as amounting to a subscription? It was an acknowledgment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the bar, there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient; but this does not, in my opinion, amount to a subscription, because whether the *i* was dotted, or the horizontal stroke was put to the *F*, to perfect the word, it was not intended that either the dot or the horizontal stroke should represent the name; the name was written in the morning, and that would continue both till and after the evening, as the subscription of the witness.

I regret very much that we are compelled to hold this instrument to be an invalid will, but we are constrained so to do by the Act of Parliament; and therefore I must advise your Lordships that this appeal be dismissed.

LORD CHELMSFORD. I regret to have to agree with my two noble and learned friends, that the will was not duly executed, as required by 1 Vict. *c.* 26. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses, present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. Now, upon witnessing the will in the forenoon of the day of its execution, Mr. Wilson subscribed his name, intending that it should be a complete signature. It was, of course, insufficient as a complete subscription under the Act, because only one witness was present, and if it had been left without anything more having been done by Mr. Wilson, no question of the imperfect attestation and subscription of the will could possibly have existed. And the question is, whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription.

Mr. Wilson certainly intended to subscribe as a witness in the afternoon. But he thought that adding the date was equivalent to a repetition of the signature. Did this amount to a second subscription? Suppose Mr. Wilson had not subscribed his name in the morning, and in the afternoon had merely put the date, could that have been considered to be such a subscription as the Act requires? The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full

name; and if the date alone would not do, of what efficacy can it be towards completing the subscription?

If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act. For there would really have been only one complete subscription. But the omission of the cross to the *F* in his Christian name did not make the signature imperfect. For Mr. Wilson states, that he very often omitted to put the cross at all; and he did not add the cross to complete his signature, so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it.

The words of the Act appear to me to be quite clear in prescribing what shall be necessary to render a will valid. And of course no equivalent can be substituted for its plain requisitions. However much, therefore, we may regret that the will of the testator should be disappointed by an accidental omission, where all parties intended to comply with the directions of the Act, yet we are bound by the express and clear language of the Legislature; and, however reluctantly, we are compelled to pronounce the will to be invalid.

THE LORD CHANCELLOR. The appeal will be dismissed without costs.

Decree affirmed, and appeal dismissed without costs.[1]

LACEY ET AL. APPELLANTS *v.* DOBBS, RESPONDENT.

63 N. J. Eq. 325, 1901.

COLLINS, J. The orphans court of Essex county admitted to probate as the last will and testament of Mary Ann Caldwell, deceased, a paper-writing, her signature to which was proved to have been made after the subscription of the putative testamentary witnesses, although on the same occasion and while they were still present.

Upon affirmance in the prerogative court, by the decree that is the subject of the present appeal, the learned chancellor, sitting as

[1] On what is sufficient subscription by a witness, see *Estate of Walker*, 110 Cal. 387; *In re Jacob's Will*, 132 N. Y. Supp. 481; *Goods of Byrd*, 3 Curt. Eccl. 117; *Playne* v. *Scriven*, 1 Rob. Eccl. 772; *Goods of Trevanion*, 2 Rob. Eccl. 311; *Goods of Redding*, 2 Rob. Eccl. 339; *Goods of Olliver*, 2 Spinks, 57; *Pryor* v. *Pryor*, 29 L. J. P. N. S. 114; *Goods of Sperling*, 3 Swab. & Tr. 272; *Goods of Maddock*, L. R. 3 P. & D. 169; 4 Am. & Eng. Ann. Cas. 637 note; 114 Am. St. Rep. 222.

The signature of a witness may be made for him by another in his presence and by his direction. *Estate of Derry*, Myr. Prob. 202; *Schnee* v. *Schnee*, 61 Kan. 643; *Upchurch* v. *Upchurch*, 16 B. Mon. 102; *Lord* v. *Lord*, 58 N. H. 7; *Mock* v. *Kaufman*, 82 N. Y. Supp. 310, 313; *Smythe* v. *Irick*, 46 S. C. 299. *Riley* v. *Riley*, 36 Ala. 496; *Horton* v. *Johnson*, 18 Ga. 396; *Simmons* v. *Leonard*, 91 Tenn. 183; *McFarland* v. *Bush*, 94 Tenn. 538, *contra*.

ordinary, was largely influenced, if not controlled, by a deliverance in that court in 1858, in the case of *Mundy* v. *Mundy*, 2 McCart. 290, to the effect that the order of signing was not material to the validity of a will. The question has been directly involved in no other reported case in this state.

The first section of the supplement, approved March 12th, 1851, to "An act concerning wills" (Gen. Stat. p. 3760), upon which all valid wills must rest, reads as follows:

"All wills and testaments of persons dying after this act shall take effect, or who may have died since the fourth day of July, in the year of our Lord eighteen hundred and fifty, shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator; and all wills and testaments of persons dying since the day above mentioned, made in manner prescribed, by any person competent by law to make such will, shall be sufficient to devise, pass and bequeath all estates and property, real or personal, and all rights of any kind, and to appoint a guardian or guardians to any child of the testator during infancy."

The grammatical sense of this enactment is that the entire testamentary act is to be attested by two witnesses, by the subscription of their names. They are to subscribe "*as* witnesses" — *i. e.*, as those who know (Saxon witan) what was said and done. They cannot know before the fact. But the apparent meaning of words must yield to authoritative judicial construction; and a judgment of the prerogative court, of long standing, although not binding in this court, should not lightly be overruled. Hence some elaboration seems proper in vindicating a determination contrary to the deliverance mentioned — the more so because of confusing adjudications elsewhere.

It will be found upon examination of the case cited that such deliverance was an ill-considered make-weight for a decision previously placed on a sound basis with which it was really inconsistent. The decree was mainly and rightly vested on the evidential force of the attestation signed by the testamentary witnesses. It was said: "The attestation clause, with the signatures of the witnesses, is *prima facie* evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. If there is no attestation clause the case is different. In the one case there must be affirmative proof of publication and of the other requisites; in the other three must be affirmative proof of the want of those requirements." In *Allaire* v. *Allaire*, 8 Vr. 312, the present chief justice, speaking for the supreme court, said that the true principle had been so declared with exactness; and in *Allaire* v. *Allaire*, 10

Vr. 113, this court held that the legal rule was thus properly settled. But not content with this firm ground of decision, the learned ordinary, evidently without scrutiny of the statute, and without that careful consideration almost always displayed in his judicial utterances, went on thus to support it: "Mrs. Manning at one time says that she thinks her husband [one of the testamentary witnesses] signed before the testator. If the fact was clearly proved, it would not affect the validity of the will. The particular order of the several requisites to the valid execution of a testament is not at all material. *Vaughan* v. *Burford*, 3 Bradf. Surr. 78." This is most unsatisfactory. The order of the requisites to the *execution* of a will *is* not material. The testator may declare the "writing" to be his will before or after or contemporaneously with the making or acknowledging of the signature, but attestation is a different matter. Of course the word "execution" was used — though inaptly — to include the subscription of the witnesses, and the New York surrogate's decision, on which too hasty reliance was placed, was to the effect stated, upon a New York statute like our own. That decision has since been repudiated by the court of appeals, and it is strange that so acute a reasoner as the writer of the opinion in *Mundy* v. *Mundy* should not have seen the inconsistency of antecedent subscription of witnesses with his declared rule that "the attestation clause, with the signature of witnesses, is *prima facie* evidence of the facts stated in it." One of those facts must be the making or acknowledging of the testator's signature. The attestation clause, he had said, can only be overcome by proof irreconcilable with its verity. When signed, therefore, in order to have such a probative force it must be *true*. The rule necessarily interprets the statute.

The rationale of the rule was very clearly stated by Vice-Ordinary Van Fleet in *Farley* v. *Farley*, 5 Dick. Ch. Rep. 434, 439. He said that an attestation clause is "for the very purpose of preserving in permanent form a record of the facts attending the execution of the will, so that, in case of the failure of memory, or other casualty, they may still be proved. It is for this reason that the courts have uniformly held that, on proof of the authenticity of the signatures of the subscribing witnesses, the facts stated in the attestation clause must be considered and accepted as true until it is shown by affirmative proof that they are not." The late chancellor, sitting as ordinary, in *Darnell* v. *Buzby*, 5 Dick. Ch. Rep. 725, 727, tersely said: "The attestation clause recites particulars which assert complete obedience to all the requirements of the statute, and the signature of the witnesses being admitted, that clause makes *prima facie* proof of all the facts stated in it."

If it be urged, as indeed it has been in some of the cases, that the legal presumption raised by the attestation clause is an arbitrary one, because the witness first subscribing cannot, in the nature of things, attest that the other subscribes in the testator's presence, the answer

is that, in this regard, all that is required by the statute is that each witness shall so subscribe. The attestation is not joint, but several, and the witness subscribing does not attest the signature, but only the presence of his colleague.

To the argument that, as like effect is given to an attestation clause by those courts that hold the order of signing to be immaterial, it is at least disputable that such rule of evidence is inconsistent with that laxity, it is sufficient to reply that in any case all that need be attested is that for which the particular statute involved requires the presence of witnesses, and that no court has yet held that attestation can precede the testator's signature where the statute construed requires, in terms, as does ours, the making or acknowledging of such signature to be in the presence of the testamentary witnesses.

Before proceeding to consider direct adjudications on the question *sub judice*, it will be necessary to present the state of the law on the subject of wills at the time of the enactment of our present statute.

Testaments of personalty were, in England, until the reign of Victoria, left to the ecclesiastical courts unaffected by legislation. Devises of lands were *sub temp.* Hen. VIII. required, by act of parliament, to be in writing, but no formalities or attestation were prescribed. The statute of frauds of 29 Car. II. *c.* 3, § 5, provided that such devises "shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect."

This statute inherently prevailed or was, in substance, enacted in the American colonies and the states of the union, many of whom extended its provisions to testaments of personalty. In New Jersey a change, in phraseology at least, was made. In 1713–1714 it was enacted that "all wills and testaments which hereafter shall be made in writing, signed and published by the testator in presence of three subscribing witnesses and regularly proved, &c., . . . shall be deemed sufficient to devise lands." Allin. L. p. 27.

This statute survived the Revolution. In *Compton* v. *Mitton*, 7 Halst. 70, decided in 1827, Chief Justice Ewing called attention to the difference between it and the English statute of frauds. He said: "Under both, wills are to be in writing, to be signed and have at least three witnesses. Our act requires the will to be published, which is not expressly directed by the other. By the English statute the will is to be signed. By our act the will is to be signed and published in the presence of witnesses. By the former the witnesses are to attest and subscribe in the presence of the devisor. By the latter they are not, in terms, required so to do, although it is our usual and commendable custom."

Like other provisions of the statute of frauds, its fifth section was very loosely construed, and to remove the consequent uncertainty,

as well as to bring testaments of personalty into uniformity with devises of land, "An act for the amendment of the laws with respect to wills" was passed by parliament, taking effect on July 3d, 1837. 1 Vict. *c.* 26. By section 9 it was enacted that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This statute soon came before the ecclesiastical courts, and in 1842 was carefully considered by Sir Herbert Jenner-Fust in the prerogative court of Canterbury. *Moore* v. *King*, 3 Curt. 243. The great importance of the case as a leading one was perceived and expressed — the previous interpretations, though of the same tenor, having been *ex parte*. *Re Goods of Olding*, 2 Curt. 865; *Re Goods of Byrd*, 3 Curt. 117. These were the facts: The testator signed the draft of his will in the presence of his sister, who subscribed her name as a witness. On the next day he acknowledged his signature, in her presence and in the presence of another person, to whom the sister pointed out her signature, and who then subscribed as a witness. The will was held invalid for lack of conformity to the statute. It was observed that the new legislation was amendatory, and, in fact, had grown out of the loose construction that had been given to the statute of frauds, and the judge said: "I clearly find that the object of this act is to remove every possible doubt, thereby taking away all latitude and discretion in its interpretation." He declared his opinion that "the act is not complied with unless both witnesses shall attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when both are actually present at the same time." He pointed out that the alternative of acknowledgment of the testator's signature, expressly given by the act, precludes any implication that the witnesses might acknowledge their signatures previously made. The same learned judge reaffirmed his opinion the next year, in *Cooper* v. *Bockett*, 3 Curt. 648, in a case where the testator signed on the same occasion as the witnesses, but after they had signed.

No English court has ever held that the statute of frauds permitted subscription of testamentary witnesses in advance of the testator's signature. When parliament passed the amendatory act such an anomaly had never, in any adjudged case, been presented or suggested. But in this country, before the New Jersey legislature acted finally in the premises, the subject had been judicially considered. In Kentucky, the statute of 1797 required that wills be "signed by the testator or testatrix or by some other person in

his or her presence and by his or her direction; and, moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses subscribing their names in his or her presence."

A will was drawn for a testator, and while still unsigned by him, was subscribed in his presence by two persons as if witnesses. Some hours later he signed it in their presence and in the presence of a third witness, who subscribed it, the first two, at the same time, acknowledging their subscription. In 1840 this will was established as valid by the supreme court of the state. *Swift* v. *Wiley*, 1 B. Mon. 114. A distinction was drawn between attestation and subscription. The judge said that subscription was required "for the sole purpose of identification." This was a misconception, for attestation of a will involves subscription, and there is a better argument in favor of the decision which I will later suggest. Under a statute practically identical with that of Kentucky, the supreme court of appeals of Virginia in 1849 held, *obiter*, that the order of signing as between testator and witnesses was not material. *Rosser* v. *Franklin*, 6 Gratt. 1. The signature of an illiterate testatrix had been written for her before the witnesses subscribed and the occasion of the *dictum* was her subsequently making her mark.

It will be observed that neither in the English statute of frauds nor in these American derivatives is it required that the testator's *signature* shall be made or acknowledged in the presence of the witnesses, and that under each statute it is the *will* that is the written disposition of the testator's property — not its due execution, that, in terms, is to be attested. It is consistent with such legislation that the writing shall be declared to be the will of the testator, although his signature be not shown to the witnesses; and if, when probate is moved or the will in anywise comes in controversy, the true signature of the testator appears upon the attested document it may be fairly arguable there has been compliance with the law. In the old case of *Peate* v. *Ougly*, Com. 197, a jury was permitted to inquire of the due execution of a will which was so folded when the witnesses subscribed it that they could not know whether or not it was signed, and a verdict for the will was sustained. This would have been impossible under 1 Vict. *c.* 26, and the precise case did, in fact, in 1844, arise under that statute. *Hudson* v. *Parker*, 1 Rob. Eccl. 14. The proof was that the witnesses had subscribed, in presence of an ostensible testator and each other, a paper on which the writing was concealed. The testator said it was his will, but did not show any signature. After his death his proper signature appeared at the end of the paper. Dr. Lushington, in an elaborate opinion distinguishing the Victorian statute from the statute of frauds, held the paper invalid as a will.

In this situation and with the same purposes that moved the British parliament in 1837, the New Jersey legislature proceeded to deal with the general subject of wills. By an act approved March

7th, 1850 (P. L. of 1850 p. 280), it was provided that "all last wills and testaments of persons dying after this act shall take effect shall be in writing and shall be signed or acknowledged to have been signed by the testator and declared to be his or her last will in the presence of at least two credible witnesses, present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." A year later the statute first above quoted and still extant was substituted. The main purpose of the change was to more clearly express the requirement that the *signature* of the testator must be made or acknowledged by him in the presence of the witnesses, and to declare in terms that the provisions of the act should extend to personal as well as real estate. The substantial identity of much of the language used with that of the English statute of 1837 makes it indisputable that the one was the model for the other. Ours is the more stringent, if there be any difference in the forms of expression. I will not say that the interpretation of the English courts of several years' standing at the time of New Jersey's adoption of the English act should be read into our statute; it is enough to say that such interpretation is highly persuasive. The previous rendition of the Kentucky and Virginia decisions furnishes another argument in that direction. It should not be lost sight of that since 1714 our law had required wills devising lands to be *signed* as well as published in presence of *subscribing* witnesses. In that respect the new statute was an enlargement, for it permitted a signature previously made to be acknowledged by the testator.

It was suggested by the learned ordinary in the court below, in this case, that there may be a difference in the effect of the two amendatory statutes, in that the English one does, while ours does not, require the witnesses to attest as well as to subscribe the will. It being expressly provided in the English act that no *form* of attestation shall be necessary, it is evident that what is meant is that the witnesses shall subscribe "*as witnesses*," which is the concise direction of our act, accordant with the usual definition by lexicographers of the word "attest" as applied to writings.

All the later English cases approve the view of Sir Herbert Jenner-Fust. It is unnecessary to cite them. The question finally reached the house of lords in 1861, and was there definitely settled in *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160, affirming Sir Cresswell Cresswell, in the new court of probate and divorce. *Charlton* v. *Hindmarsh*, 1 Swab. & T. 433. Briefly stated, the case was this: Hindmarsh produced to Dr. Wilson, a surgeon attending him in illness, a paper-writing, which he then signed and said was his will, and asked the surgeon to subscribe as a witness. Dr. Wilson wrote "witness to the above will and testament, and signature," and signed his name, inadvertently omitting to cross a capital F, so that it stood as a T. Later in the day Dr. White, the physician in regular attendance,

called, and there was a medical consultation. Dr. Wilson had previously told Hindmarsh that there ought to be another witness to the will, and, after the consultation, both doctors went into the sick-room, taking it with them. Hindmarsh then acknowledged his signature and Dr. White subscribed his name as a witness. Dr. Wilson, noticing that the F in his name lacked a cross, supplied one, and, at Dr. White's suggestion, added the date. It was held that, in order to comply with the statute, "the signature or acknowledgment of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed, or so acknowledged, his signature, subscribe the will in his presence"; and that a correction of an error in a previous writing of the name of a witness, or his acknowledgment of his signature, or the adding of a date, will not be sufficient. The lord-chancellor (Campbell) and Lords Cranworth and Chelmsford gave concurring opinions, each expressing regret that the stability of the law required the court to deny effect to a meritorious disposition of property in a case where there was a plain, but abortive, attempt to comply therewith.

The American decisions defending subscription by testamentary witnesses in advance of a signing by or for the testator that have been rendered since the enactment of the New Jersey statute of 1851 rest on legislation much less restrictive than that. In *Miller* v. *McNeill*, 35 Pa. St. 217, often cited, what was said on the subject was entirely gratuitous, for, under the Pennsylvania statutes, such subscription is supererogatory. *Hight* v. *Wilson*, 1 Dall. 94; *Rohrer* v. *Stehman*, 1 Watts, 463; *Frew* v. *Clarke*, 80 Pa. St. 170, 178. The act requires only that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; and otherwise shall be of no effect."

Of course, persons actually witnessing the testamentary act are not debarred from proving it by having prematurely subscribed their names to the will. In the case cited, Woodward, J., said: "Our statute contemplates, undoubtedly, a signing by testator, and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment, and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? The execution and attestation of the will were concurrent, or rather simultaneous acts and we will not regard the question of who held the pen first, the testator or his witnesses." I have quoted this *dictum* because it carries its own refutation and makes strongly for the contrary decision where a statute not only "contemplates," but *directs* an orderly succession of acts.

The other cases are four in number, viz., *O'Brien* v. *Galagher*, 25 Conn. 229; *Moale* v. *Cutting*, 59 Md. 510; *Kaufman* v. *Caughman*, 49 So. Car. 159, and *Gibson* v. *Nelson*, 181 Ill. 122.

Except as to Illinois, all the statutes involved closely follow the language of the English statute of frauds; in those of Connecticut and South Carolina there being the additional requirement that the witnesses shall subscribe in the presence of each other. These cases are not helpful in interpreting our statute, and indeed, in the South Carolina case, the learned judge rests the court's decision on the elasticity of the statutes construed. After noticing that, under 1 Vict. *c.* 26, the English courts hold that the signature, or acknowledgment of signature, of the testator must precede subscription by the witnesses, he justifies that interpretation of the act, although he thinks it a strict one, on the ground that it is such *signature* that the witnesses are to attest. He says that the English act clearly places more stress than that of South Carolina on the mere manner of executing wills, and he concludes: "When the statute expressly or by necessary inference requires such formalities, then nothing is left but to enforce it; but the court will not stress formalities which the statute does not." In Maryland, also, the court, in an earlier decision, declaring that, in that state, testamentary witnesses need not subscribe the will in presence of each other, had called attention to the fact of the essential differences between the statute of frauds (of which it was said the Maryland act was a copy) and the Victorian statute, as pointed out by Sir Herbert Jenner-Fust.

The Illinois statute is unique. It enacts that "all wills, testaments and codicils . . . shall be reduced to writing and signed by the testator or testatrix or by some person in his or her presence, and by his or her direction and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign the said will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of such will, testament or codicil to admit the same to record; provided, that no proof of fraud," &c.

Plainly it is the will, not the signature or its acknowledgment, that is to be attested, and the supreme court of the state, in *Hobart* v. *Hobart*, 154 Ill. 610, has held that where a testator does not sign in presence of the witnesses it is not necessary for him to acknowledge in their presence a signature previously made, the words "the same," twice occurring in the statute, in the opinion of the court, referring back to "said will"; and while, in *Gibson* v. *Nelson*, *ubi supra*, the same court, solely on the authority of *O'Brien* v. *Galagher*, *Rosser* v. *Franklin* and *Miller* v. *McNeil*, *ubi supra*, did hold the order of

signing immaterial, it indulged in reasoning that destroyed the force of its decision — if the statute requires attestation of signature — by declaring that "undoubtedly the proper order is for the testator to sign first, for after the witnesses had signed, he might never sign, or might sign on some other occasion, or out of their presence, which would not be a compliance with the statute."

I do not concede that the American cases were rightly decided. I very much doubt if the English courts would have so construed their basic legislation. In *Peate* v. *Ougly*, *ubi supra*, the verdict was justified only on the assumption that the jury found that there was execution before attestation. In *Windham* v. *Chetwynd*, 1 Burr. 414, 421, Lord Mansfield seems to imply such a necessity, while in *Roberts* v. *Phillips*, 4 El. & B. 450, 459, Campbell (then lord chief-justice) assumes it in upholding as valid a subscription by the witnesses at a place other than the foot of a will made in 1828. He says: "The mere requisition that the will shall be *subscribed* by the witnesses we think is complied with by the witnesses who saw it executed by the testator immediately signing their names on any part of it, at his request, with the intention of attesting it." In this country the courts of five states have interpreted enactments copied from the statute of frauds as requiring signature by or for the testator before there can be subscription, in attestation, by the witnesses. In North Carolina this occurred in 1841 (*Ragland* v. *Huntingdon*, 1 Ired. L. 561); followed in 1854 (*In re Cox's Will*, 1 Jones L. 321); but the first adequate treatment of the subject was in 1865, by Gray, J., in the Massachusetts supreme court, in *Chase* v. *Kittredge*, 11 Allen, 49. With a wealth of erudition and argument he demonstrated, both on authority and principle, that attestation cannot precede execution of a will. The Massachusetts statute, enacted in 1836, as quoted in the report, was as follows:

"No will (excepting nuncupative wills) shall be effectual to pass any estate, whether real or personal nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses."

On the point in question the learned judge saw no difference between the statutes of Charles and Victoria, and he accepts the English decision culminating in *Hindmarsh* v. *Charlton*, *ubi supra*, as authoritative and coincident with the reason of the case. He assumes indeed, as did the Kentucky court, that attestation and subscription are separate acts, but only to insist the more strongly that subscription by the witnesses, which he says is "in proof of" their attestation, must be the final act in the series essential to a valid will. No judge differing in opinion has attempted to answer the argument of Judge Gray, though several have ignored the decision as authoritative except where, as in the case decided, a

necessary witness had subscribed the will in the absence of the testator. In a very recent decision the supreme court of Massachusetts has adopted Judge Gray's opinion in a case directly in point, and, as compactly stated in the head-note, has held that "witnesses to a will must sign after the testator has signed." *Marshall* v. *Mason*, 176 Mass. 216 (1900). *Chase* v. *Kittredge* was approved and followed, in 1867, in Indiana, where Chief Justice Elliott says that the statute is substantially the same as 29 Car. II. *c.* 3 § 5, except that the English act related only to devises and required three or four, instead of two or more, subscribing witnesses. *Reed* v. *Watson*, 27 Ind. 443. In Georgia, in 1869, it was held that, under a like statute, subscription of witnesses could not be vivified by acknowledgment after a signing by the testator on the following day (*Duffie* v. *Corridon*, 40 Ga. 122), and in 1891 it was directly held, in an opinion by Chief Justice Bleckly, that "the witnesses to a will must subscribe their names as witnesses after the will is signed by the testator — there being nothing to attest until his signature has been annexed. It makes no difference that the signing and attestation are each a part of one and the same transaction." *Brooks* v. *Woodson*, 87 Ga. 379. A concise, but comprehensive, note by the reporter classifies the decisions on the general subject, including some that are merely cognate to the questions involved. The annotation to this case, as reported in 14 L. R. A. 160, may also be consulted with profit. The fifth state is Texas, where the ruling, though postulated for a decision of the tenor of *Roberts* v. *Phillips*, *ubi supra*, is positive and unequivocal. *Fowler* v. *Stagner*, 55 Tex. 393.

It appears, therefore, that even under statutes not, in terms, requiring a testator's *signature*, but only his declared written will, to be attested, very weighty judicial opinion repudiates the idea that there can be attestation before signature. In no case has it been held that, where there is that requirement, subscription of witness can precede such signature. The only state having that statutory requirement, the courts of which have had occasion directly to deal with it, is the State of New York. There the statute, since January 1st, 1830, has read as follows:

"Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: (1) It shall be subscribed by the testator at the end of the will. (2) Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. (3) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament, and (4) there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." 2 Rev. Stat. p. 63 § 40.

In construing this statute, in *Vaughan* v. *Burford*, *ubi supra*, and other decisions, Surrogate Bradford went astray. The supreme court, following him, established a will signed by the witnesses before subscription by the testator, but on the same occasion. The judgment was reversed in 1868 by the unanimous voice of the court of appeals, then exceptionally strong. The reasoning of the opinion of WOODRUFF, J., is so cogent, yet simple, that I will quote it. After showing the substantial identity of the New York statute with section 9 of 1 Vict. *c.* 26, and citing many of the English decisions interpreting that act, he proceeds:

"Our statute on this precise point reads: 'There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.' They are, in and by this act of signing their names, to attest, not only the signing, or acknowledgment of signing, of the testator, but his contemporaneous declaration that it is his will. Their signatures do not attest the signing by the testator if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution — they certify what is not true — when and in what moment do they begin to operate as a compliance with the statute? The only reply that can be given is, when the testator signs his name. This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week or one year, and then add his signature? Certainly not, unless he summon the same persons to see him sign or hear his acknowledgment thereof. But suppose he adds his signature and dies, what then becomes of the presumption of due execution, arising from the apparent regularity and the due form of the attestation clause? Once let it be settled that witnesses may sign before the testator and all presumption of due execution, when witnesses are dead or beyond reach, ceases. If it be said that witnesses will not sign, and so leave their names in the possession of a testator; to suppose they would, is to impeach their honesty, and it is the presumption of men's truth and honesty which makes regularity and formal attestation *prima facie* evidence of due execution, I do not think this a sufficient answer. The statute contemplates acts, each of which is serious and important. Execution and the attestation thereof bear a plain relation to each other in point of time, in the good sense and common apprehension of every one, and the statute prescribing the requisite formalities to a valid execution and authentication plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished. I was at first inclined to think that if the whole was done at the same interview, the attestation by the signing of the witnesses might be done in any part of it, without regard to the order of events, as above suggested, the acts of the testator may be; but, upon further reflection, I am satisfied that the view

taken of the subject of the ecclesiastical court in England best conforms to the language and intent of the statute. The signing or acknowledgment by the testator and his declaration that the instrument is his last will and testament are, in the statute, made contemporaneous, and neither must necessarily precede the other, and yet, in practice, this must be construed to mean on the same occasion, each as part of the same transaction, and not requiring that the words of declaration should actually accompany the movement of the pen in signing, or be actually embraced in the terms of acknowledgment of such signing. Practically which utterance is first is of no possible importance. The attestation by witnesses is of a past transaction — it is so in its nature, and so in the ordering, and, I think, the meaning of the statute. This distinction, if it served no useful purpose, if the contrary was liable to no danger, nor led to any abuse, might be deemed a too strict adherence to the literal interpretation of the law. But reasons I have suggested already, I think, show that a strict adherence to the statute is demanded. Upon the ground that, according to the testimony as it appears in the case before us, the witnesses signed before the testator, the judgment of the supreme court should be reversed."

The doctrine of this case was reaffirmed in 1876, in the case of *Sisters of Charity* v. *Kelly*, 67 N. Y. 409, FOLGER, J., saying: "It is clearly proven that the witnesses to the instrument saw no act of signing it by the deceased until after they had signed their own names to it. It is the law of this state that a subscription of a will by the testator after the witnesses have signed their names to it is not a due execution of it by him."

It is quite plain that if the true interpretation of our statute is that the witnesses are to attest, by their subscription, the testator's signature, or acknowledgment of signature, an instant of precedence on their part will render that impossible. There is no force in the argument that, in case of an uninterrupted transaction, the orderly course of procedure is not material. The case is not one of a rule that may be relaxed, but one of interpretation of language which, in the nature of things, must be rigid. Once it is determined what the words of a statute mean, they must, under all circumstances, have that meaning. It is not permissible to hold that "follow" can ever mean "precede." Besides, such a judicial modification of the statute — for that it must be — would be unsafe. Witnesses subscribing a will, on the faith that the testator will immediately sign it, can retain no dominion over the paper, and can in no way recall their act or advertise its abortion if the testator fails on his part. Protection, as well of the witnesses as of the testator, demands that there shall be a signature before attestation. Argument based on a loose practice with other than testamentary writings is valueless, for their *validity* does not depend on due attestation.

I conclude that, under our statute, it is essential to validity that

everything required to be done by the testator shall precede, in point of time, the subscription of testamentary witnesses.

I shall therefore in this case vote for reversal and for the direction of decree denying probate to the paper-writing propounded as the will of Mary Ann Caldwell.

For reversal — VAN SYCKEL, DIXON, GARRISON, GUMMERE, COLLINS, GARRETSON, HENDRICKSON, VREDENBURGH, VOORHEES, VROOM — 10.

For affirmance — BOGERT, KRUEGER, ADAMS — 3.[1]

SHIRES *v.* GLASCOCK.

2 Salk. 688. 1687.

UPON a feigned issue, the question was, Whether the will was made according to the Statute of Frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. ET PER CUR. The Statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn.

CASSON *v.* DADE, CLERK.

1 Bro. C. C. 99. 1781.

HONORA JENKINS having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was accidently put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. The

[1] See *Matter of Silva*, 169 Cal. 116; *Lane* v. *Lane*, 125 Ga. 386; *In re Horn's Estate*, 161 Mich. 20; *Cutler* v. *Cutler*, 130 N. C. 1; *In re Baldwin*, 146 N. C. 25; 5 Am. & Eng. Ann. Cas. 463 note; 20 Am. & Eng. Ann. Cas. 1367 note; 114 Am. St. Rep. 233 note; 26 L. R. A. N. S. 1126 note.

LORD CHANCELLOR [LORD THURLOW] inclined very strongly to think the will well executed, and the case of *Shires* v. *Glascock*, 2 Salk. 688 (1 Lord Raym. 507), 1 Eq. Abr. 403, was relied upon to that purpose. *Mr. Arden* pressed much for an issue; but, finding LORD CHANCELLOR'S opinion very decisive against him, declined it.[1]

GOODS OF COLMAN.

3 Curt. Eccl. 118. 1842.

EDWARD COLMAN died at Naples, on the 2d of April, 1842. On the 25th of March, the deceased being ill in bed, two persons were called into his bed-room for the purpose of seeing him sign his will, and to attest its execution; the deceased then signed the will, in the presence of those two persons, but being apparently exhausted by the effort, the witnesses retired into an adjoining room, which communicated with the bed-room by folding doors, each of the width of about eighteen inches, and which were open at the time, being tied back by strings, and the witnesses there subscribed their names to the will on a table, which was so situated, that it was impossible for the deceased to have seen them.

SIR HERBERT JENNER FUST. I know of no case which would authorize the court to hold that this will was attested and subscribed by the witnesses in the presence of the deceased; had the deceased been in such a situation that he might have seen the witnesses subscribe their names, it might have been held to have been done constructively in his presence, as in the case where a lady sat in her carriage, whilst the will was attested in a solicitor's office, in which she might have seen the witnesses sign their names. Here it was impossible for the deceased to see the witnesses. I reject the motion.[2]

NORTON *v.* BAZETT.

D. & Sw. 259. 1856.

SIR JOHN DODSON.[3] The question in the present case is, whether the witnesses subscribed their names to the paper propounded in the presence of the testator within the meaning of the word "presence" used in the 9th section of the Wills Act. The will is in

[1] See *Raymond* v. *Wagner*, 178 Mass. 315, 318.

[2] *Calkins* v. *Calkins*, 216 Ill. 458; *Schofield* v. *Thomas*, 236 Ill. 417; *McKee* v. *McKee*, 155 Ky. 738; *Mendell* v. *Dunbar*, 169 Mass. 74; *Mandeville* v. *Parker*, 31 N. J. Eq. 242; *Jones* v. *Tuck*, 3 Jones Law, 202; *Doe d. Wright* v. *Manifold*, 1 M. & S. 294, *accord*. But see *Cook* v. *Winchester*, 81 Mich. 581; *Cunningham* v. *Cunningham*, 80 Minn. 180; *Healey* v. *Bartlett*, 73 N. H. 110.

[3] Only the opinion is given.

the deceased's handwriting, on two sheets of paper, dated at the beginning the 13th, and at the end the 14th of July, as if he had been occupied two days in writing it out. The witnesses state that on the 14th he was busy in the inner room of his office writing on private affairs during the morning; that in the afternoon he called them into that inner room, from the outer room in which they sat, signed his name in their presence, and desired them to attest his signature, whereupon they returned to the outer office, wrote their names, and one of them brought back the paper. The door between the two rooms was open; but it appears from the evidence, and the plan which was brought in, that the place where the deceased sat in the inner room, with his back to the wall between the two rooms, was not visible to the clerks standing at the desk where they wrote their names. They could not see the deceased, nor could he see them, unless he had got up from the chair, and moved some two or three steps towards the open door. The evidence is, further, that when the clerk who brought the will came into the room, the deceased had risen from his chair, but was standing in front of that chair — had in fact merely got up to sort his papers, or for some such purpose; and there is no evidence whatever to show that he moved from the table to any part of the room from which he could see the witnesses.

In the course of the argument many, if not all, the cases which could assist the court in forming its judgment were cited. In *Newton* v. *Clarke*, 2 Curt. 320, the whole transaction took place in one small room, with only the curtain at the foot of the bed to interrupt the view; and Sir H. Jenner held the will to be well executed, observing that it would be somewhat strange to say that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. *Hudson* v. *Parker*, 1 Rob. 14, has not, I think, any very great bearing upon the present case. *Tribe* v. *Tribe*, however, in the same volume, page 775, seems, until closely examined, at variance with *Newton* v. *Clarke;* but it is clear that in *Tribe* v. *Tribe* it was proved that the deceased could not by possibility have seen the witnesses, and on that ground it was held that although the witnesses subscribed in the same room, still they did not so subscribe in the presence of the deceased. I should observe that most of the cases cited by counsel were also cited in *Newton* v. *Clarke*. In 3 Curt. 118, there is the case *In the Goods of Colman*, which very closely resembles the present; and I can find no more sure or certain guide for my instruction than that case. The only distinction is, that there the deceased could not have moved — here he was in a situation where he could not see without moving; and upon this distinction it has been suggested that he might have moved, and then he would have seen; but there is no proof in support of the fact suggested; there is no proof whatever that he did move; and I think it is too much for the court to presume, that in the short

space of time occupied by the witnesses in signing their names he did move. The conclusion to which I must come is, that where the witnesses subscribe in a different room from that in which the testator is, they must be shown to have subscribed in a position visible to the testator; that is not proved here, and I must pronounce against this will. I do so with much regret, but I have no discretion; and judging for myself, and in my own conscience, I cannot hold that there was a constructive presence such as would justify this court, whatever the Court of Appeal may do, in pronouncing for this will.[1]

NEWTON ET AL. *v.* CLARKE.

2 Curt. Eccl. 320. 1839.

THIS was a question as to the admission of an allegation, propounding a paper as a codicil to the will of Mr. Patrick Persse, who died in June, 1839. The question was, whether the codicil was duly executed under the Statute 1 Vict. *c.* 26. It was alleged, that on the 8th of April, 1839, the deceased, being then confined to his bed, directed his nephew, who was the residuary legatee in the will, to prepare a codicil, increasing the legacy of a servant from £60 to £100, which he prepared accordingly, and brought to the deceased in his bedroom, which was small, the bed standing with the foot towards the fire-place. During the execution of the codicil by the deceased, the curtains of the bed were drawn open on both sides, but closed at the foot of the bed. Two small tables were in the room, one at the foot and the other at the side of the bed. When the nephew returned with the codicil (which he had prepared in another room), into the deceased's bed-chamber, he read the same over, in the presence of White, the deceased's footman, Clarke, the servant whose legacy was increased by the codicil, and the nurse to the deceased, who in their presence and hearing, expressed his approbation thereof; the deceased then signed the codicil, in the presence of the same persons, except that one of them (White, the footman) did not actually see him sign the paper, as he was standing by the fire, where the curtains of the bed were closed. The nephew then subscribed his name, as attesting the execution, and proposed that White should do the same; previous to which, he again read the paper to White, in the presence and hearing of the testator. White then attested the codicil, signing it upon the small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign.

SIR HERBERT JENNER. The word "present" occurs in the Statute of Frauds, and the meaning of that word has been a subject of discus-

[1] See *Raymond* v. *Wagner*, 178 Mass. 315; *In re Beggan's Will*, 68 N. J. Eq. 572; *Moore* v. *Moore*, 8 Gratt. 307.

sion in the cases referred to. In the present case, the first consideration is, under what circumstances the execution took place. It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is, that all that was going on was heard by the deceased, the bed-curtains being open on both sides, and only closed at the foot, to screen him from the fire. All the other requisites of the Act were complied with, but it is said White could not see the testator sign his name, nor the testator see him attest his signature. To be sure it appears somewhat strange to say, that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. As far as the words of the Act go, I should be of opinion, without reference to the cases, that the witness, being in the same room, was present. The object of the Act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the Act of Parliament. The several cases referred to were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In one of those cases (that of *Casson* v. *Dade*, 1 Bro. Ch. Cas. 99), the doctrine of constructive presence was carried to a great length, for the testatrix executed the will in her carriage, standing at the office of her solicitor, the witnesses retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in such a situation that she might see the witnesses sign the will through the window of the office; and this was held to be tantamount to being present: she had not ordered her carriage to be put back, and yet it was held that the attestation was constructively in her presence. In this case, no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy.

I am of opinion, that under the Act, where a paper is executed by the deceased, in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign; and if the facts pleaded in this allegation are proved to the satisfaction of the court, I must pronounce for the validity of the codicil. *Allegation admitted.*

The executors afterwards took probate of the codicil.[1]

[1] Compare *Drury* v. *Connell*, 177 Ill. 43; *Ellis* v. *Flanigan*, 253 Ill. 397; *Brown* v. *Skirrow*, [1902] P. 3.

TRIBE *v.* TRIBE AND OTHERS.

1 Rob. Eccl. 775. 1849.

SIR HERBERT JENNER FUST.[1] . . . There is another question, namely, whether there has been a due compliance with the act. The witnesses are at variance in their statements. Mary Tribe, the drawer of the will, and an interested witness, swears the curtains of the bed in which the testatrix lay were not closed, and that the attesting witnesses signed in the testatrix's sight; on the other hand, the attesting witnesses swear not only that the curtains were closed, but that it was from the circumstances they state physically impossible that the testatrix could have seen them sign. I must take the statement of the attesting witnesses to be the correct version; that not only were the curtains closed, but that had they not been closed, it was impossible, from the state in which the testatrix was, for her to have turned herself in her bed so as to have seen the witnesses sign. Under this state of circumstances what difference would there have been, on principle, if the witnesses had signed the will downstairs? The decision in *Newton* v. *Clarke*, 2 Curt. 320, was, I consider, right; but were I to hold the attestation in the present case good, I should go infinitely beyond that case. I cannot consider that there has here been a due compliance with the requisites of the Statute, consequently I pronounce against the will propounded, that of December, 1848; but beyond recommending the opposing party to pay the costs, I give no order respecting them.[2]

GRAHAM *v.* GRAHAM.

10 Ired. (N. C.) 219. 1849.

APPEAL from the Superior Court of Law of Rowan County, at the Fall Term 1848, his Honor Judge MOORE presiding.

This is an issue, *devisavit vel non*, made up under the Statute to try the validity of a paper writing, propounded as the will of John Graham, deceased. The evidence was, that the supposed testator executed the will in the presence of two witnesses, and desired them to attest the instrument. He was lying in bed very sick at the time, and the two witnesses withdrew into another room, between which and the testator's sick chamber there was a door open, and at a large chest in that other room the witnesses signed their names. The bed, in which the deceased was lying, stood by the partition between the two rooms, and two or three feet from the door, and the chest, on which the witness subscribed the will, stood also against

[1] The statement of facts is omitted.

[2] *Brooks* v. *Duffell*, 23 Ga. 441; *Reed* v. *Roberts*, 26 Ga. 294; *Neil* v. *Neil*, 1 Leigh. 6, *accord*. And see *Burney* v. *Allen*, 125 N. C. 314.

the other side of the partition, and nearly opposite to the bed; so that the testator, as he was lying in bed, could, by turning his head and looking around the side of the door, see the backs of the witnesses, as they sat at the chest writing, but he could not see their faces, arms, or hands, or the paper on which they wrote; a view of those being obstructed by the partition. After the signing by the witnesses, they returned with the will into the room where the testator was, and informed him they had witnessed it, and he requested a person present to take charge of it. The court directed the jury, that, though the testator could have seen enough of the persons of the witnesses, while they were subscribing the will, to enable him to recognize them, yet if he could not have seen what was going on, whilst they were in the act of attestation, the paper was not properly executed and attested. The jury found against the will, and from a judgment accordingly the executor appealed.

RUFFIN, C. J. The rule laid down by his Honor seems to be a very rigid construction of the terms "in his presence," which are used in the Act; but it is in conformity with the cases hitherto decided on this subject, and, we believe, with the policy and meaning of the Statute. Except in the case of a blind person, "presence" seems to have been understood as having the same sense as "within view"; and it follows, that the thing to be seen, or to be within the power of the party to see, is the very fact of subscribing by the witness. Thus in *Shires* v. *Glascock*, 1 Atk. 688, which was the first or one of the first cases that occurred in England under the Statute of Frauds, it was held that a signing in another room, some yards distant from the testator, was a subscribing in his presence, because he might see it by a broken window; the court saying, "that the Statute required attesting in the presence of the testator, to prevent obtruding another will in the place of the true one"; therefore, that when "the signing is in the view of the testator, it is enough," though he should not actually see them signing. That, we take it, is the true principle of the Statute, that a subscribing by the witness must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see, that the paper signed by him is the same, which is subscribed by the witness. Therefore, when they subscribe out of the testator's room, and in such a situation that he cannot see the paper, and for that reason cannot see and know for himself, that it is the true paper, it cannot in any proper sense be said, that the thing was done in his presence. The Statute meant, that he should have evidence of his own senses to the subscribing by the witnesses, just as he should to a signing for him by another by his direction and in his presence; so as to exclude almost the possibility of imposition by substituting one paper for another, without detection by the testator himself upon his own ocular observation, and without exposing him to any risks from undue confidence. In *Doe dem. Wright* v. *Mansfield*, 1 M. & S. 294,

Lord Ellenborough lays down this to be the rule; that, when the devisor cannot see "the act doing," that is out of his presence. And in the case of *Casson* v. *Dade*, 1 Bro. C. C. 99, Lord Thurlow held a will to be well executed which was attested at the window of an attorney's office, because the testatrix was sitting in her carriage and it was put back to the window of the office, so that she "might see what passed"; so it is said in the other case of *Davy* v. *Smith*, Salk. 395, that the testator might have seen the witnesses "subscribe their names" if he would, and therefore that the will was well executed. We believe, indeed, that there is no instance, in which a paper has been sustained, where the attestation was under such circumstances, that the testator could not see what was done, so as to protect himself upon his own knowledge against any dishonest substitution by the people, whom he is obliged by the law to select, and depend upon, as subscribing witnesses to his will.

PER CURIAM. *Judgment affirmed.*[1]

GOODS OF PIERCY.

1 Rob. Eccl. 278. 1845.

CHARLOTTE PIERCY died in February, 1845, having just before her death executed her will. She was very ill in bed, and totally blind, but in full possession of her mental faculties. The will was prepared according to her directions, and read over to her. In the presence of the attesting witnesses she signed her name in bed, one of them having placed her hand on that part of the paper where it was necessary for her to sign. By reason of there not being any table or other convenience in the bedroom on which the witnesses could sign their names, they all proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there within view of the bedroom, the doors of both rooms being open, respectively subscribed their names. A plan of the rooms was laid before the court, and in a second affidavit it was sworn, that the testatrix, from her bed, could have seen the witnesses at the table when they signed, had she had her eyesight.

Addams, on these facts, moved the court for probate.

SIR HERBERT JENNER FUST. When this case was moved on a former occasion, there was no evidence to show that the testatrix could have seen the witnesses sign, had she had her eyesight, and I felt I could not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application.

[1] See *Drury* v. *Connell*, 177 Ill. 43; *In re Tobin*, 196 Ill. 484; *Burney* v. *Allen*, 125 N. C. 314; *Nock* v. *Nock*, 10 Gratt. 106.

RIGGS *v.* RIGGS AND OTHERS.

135 Mass. 238. 1883.

APPEAL from a decree of the Probate Court disallowing the will and codicil of Jackson Riggs. The case was heard before C. ALLEN, J., on the issues whether the witnesses to the will and codicil, or to either of them, attested and subscribed the same in the presence of the testator, within the meaning of the Statute. The will was executed on November 15, 1881, and the codicil, which confirmed the will except in one particular, was executed on December 8, 1881. The judge ordered a decree to be entered that the will and codicil be admitted to probate, and the case remitted to the Probate Court for further proceedings. The contestant appealed; and the judge reported the case for the determination of the full court, in substance as follows: —

The witnesses to the will saw the testator sign it, and were in the room with him at the time; and they signed it as witnesses in the room adjoining that in which the testator was, and at a distance of about nine feet from him, the door being open. The testator was in bed, and in such a position that, if he had been able to turn his head round, he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time, when their bodies obstructed the view; but, from the effect of an injury which he had received, he could not, in point of fact, turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses.

The witnesses to the codicil did not see the testator sign it, but he acknowledged it to be his signature in their presence, and they signed the codicil as witnesses in the same room with him, and within four feet of his head, and at a table which stood near the head of his bed, and on one side, and a little farther back than directly opposite to his head. By turning his head, if he had been able to do so, he could have seen them when they signed their names, and also the codicil itself; but, in point of fact, from the effect of said injury, he was not able to turn his head sufficiently to see them or the codicil at the time when they were signing their names as witnesses.

After the witnesses had signed their names to the original will, it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said he was glad it was done. At the times when the witnesses signed their names to both will and codicil, the testator was conscious, and could hear all that was said, and knew and understood all that was done.

Upon the evidence, there was no reason to suspect any fraud upon the testator in respect to the execution or attestation of the

will, or any undue influence upon him; and it was conceded that he was of sufficient mental capacity.

MORTON, C. J. The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. Sts. c. 92, § 6. Pub. Sts. c. 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar statutes, that such an attestation is not sufficient. See *Aikin* v. *Weckerly*, 19 Mich. 482, 505. *Downie's Will*, 42 Wis. 66. *Tribe* v. *Tribe*, 13 Jur. 793. *Jones* v. *Tuck*, 3 Jones (N. C.) 202. *Graham* v. *Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our Statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the Statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278. *Fincham* v. *Edwards*, 3 Curt. Ecc. 63. It would be against the spirit of our Statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The Statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they

must subscribe "in his presence"; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed.

Decree affirmed.[1]

[1] Compare *In re Allred's Will*, 86 S. E. (N. C.) 1047; *Pickett's Will*, 49 Oreg. 127, 138; *Ray* v. *Hill*, 3 Strob. 297.

Many authorities on what amounts to signing "in the presence of the testator" are collected in 6 Am. & Eng. Ann. Cas. 414 note; 114 Am. St. Rep. 225 note.

NOTE. — As to the necessity of calling the subscribing witnesses to prove a will, see 2 Wigmore, Evidence, §§ 1304–1321; 2048–2049; 1 Woerner, Am. Law of Adm. (2d ed.), §§ 216–218; 47 L. R. A. N. S. 722 note.

On the evidence of the witnesses and the necessity and effect of an attestation clause, see *Leverett* v. *Carlisle*, 19 Ala. 80; *Hobart* v. *Hobart*, 154 Ill. 610, 619; *Gould* v. *Theological Seminary*, 189 Ill. 282, 286–287; *Mead* v. *Trustees of Presbyterian Church*, 229 Ill. 526; *Elston* v. *Montgomery*, 242 Ill. 349; *Turner* v. *Cook*, 36 Ind. 129, 136; *Higdon's Will*, 6 J. J. Marsh. 444; *Osborn* v. *Cook*, 11 Cush. 532, 534; *Abbott* v. *Abbott*, 41 Mich. 540, 542; *Munroe* v. *Huddart*, 79 Neb. 569; *Allaire* v. *Allaire*, 37 N. J. L. 312; *Swain* v. *Edmunds*, 53 N. J. Eq. 142; 54 N. J. Eq. 438; *Orser* v. *Orser*, 24 N. Y. 51; *Skinner's Will*, 40 Oreg. 571; *Willis* v. *Lowe*, 5 Notes of Cas. 428, 432, 434; 2 Wigmore, Evidence, § 1512; 11 Am. & Eng. Ann., Cas. 428 note; 114 Am. St. Rep. 236 note; 14 L. R. A. N. S. 255 note.

H. *Conditional Wills.*

EATON *v.* BROWN.

193 U. S. 411. 1904.

THE facts are stated in the opinion of the court.

MR. JUSTICE HOLMES delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

"Washington, D. C. Aug. 31″/001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please.

Caroline Holley."

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicil of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the *factum* of the instrument. *Pohlman* v. *Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. *Parsons* v. *Lanoe*, 1 Ves. Sr. 189; *S. C.*, Ambler, 557; 1 Wils. 243; *Sinclair* v. *Hone*, 6 Ves. 607, 610; *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed

that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon* v. *Damon*, 8 Allen, 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a common place. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody* v. *Conly*, 27 Gratt. 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands. We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent — one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith* v. *Cabell*, 19 Gratt. 758, 783. And then she goes on to say that all that she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon

which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons* v. *Lanoe*, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no court of equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. Ambler, 561; 1 Ves. Sr. 192. It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return (which I will, no preventing Providence)." *Todd's Will*, 2 W. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the Goods of Porter*, L. R. 2 P. & D. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 P. D. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. *In the Goods of Mayd*, 6 P. D. 17; *In the Goods of Dobson*, L. R. 1 P. & D. 88; *In the Goods of Thorne*, 4 Sw. & Tr. 36; *Likefield* v. *Likefield*, 82 Kentucky, 589; *Bradford* v. *Bradford*, 4 Ky. Law Rep. 947; *Skipwith* v. *Cabell*, 19 Gratt. 758, 782–784; *French* v. *French*, 14 W. Va. 458, 502.

Decree reversed.[1]

[1] See *Sewell* v. *Slingluff*, 57 Md. 537; *Whitaker's Estate*, 21 Pa. 646; *French* v. *French*, 14 W. Va. 458; *Marston* v. *Roe d. Fox*, 8 A. & E. 14, *post*, p. 272; *Estate of Vines*, [1910] P. 147; 1 Williams, Exec. (10th ed.), pp. 134–137. Compare *Folsom* v. *Board of Trustees*, 210 Ill. 404; *In re Steiner's Will*, 152 N. Y. Supp. 725.

NOTE. — On contracts to make a will, and on joint and mutual wills, see *In the Estate of Mary Hays*, [1914] P. 192; 14 Col. Law Rev. 95, 272; 28 Harv. Law Rev. 218; Professor George P. Costigan, Jr., in 28 Harv. Law Rev. 246–251; 17 Am. & Eng. Ann. Cas. 1006 note; 1915 A Am. & Eng. Ann. Cas. 364 note; 14 L. R. A. 860 note; 15 L. R. A. N. S. 466 note; 27 L. R. A. N. S. 508 note; 37 L. R. A. N. S. 1196 note; 38 L. R. A. N. S. 752 note; 12 Prob. Rep. Ann. 64 note; 1 Williams, Exec. (10th ed.), pp. 94–96.

SECTION III.

THE REVOCATION OF WILLS.

A. *By Subsequent Instrument.*[1]

BROOK *v.* WARDE.

Dyer 310 b. 1572.

ONE Kyete, of Kent, by his will in writing, devised his land of gavelkind to one Harrison in fee; and five days before his death he revoked his will in this point, by parol only, in the presence of three witnesses, requiring their testimony of his present revocation; and said to them further, that he would alter this in his written will when he came to town, &c., and before his coming thither he was murdered by the said Harrison. And Harrison caused the will in writing, as it was at first, to be proved; and by color thereof entered into the devise, and then was attainted of murder, and hanged: and his son entered by the law of gavelkind, *s.* "The father to the bough, the son to the plough." This matter came out in evidence to a jury of Kent this term, in *ejectione firmæ* between *Brooke and Warde;* and this manner of revocation by parol as above was affirmed for sufficient revocation at bar and bench, although it was not in writing, nor the first will in that point cancelled or defaced; *vide bene.*[2]

HITCHINS *v.* BASSET.

2 Salk. 592. 1693.

IN ejectment, the jury found a special verdict: That Sir H. Killigrew being seised in fee, made his will, and devised his lands to B. for life, remainder to C. in fee; they find likewise that Sir H. Killigrew made *aliud testamentum* in writing; but what were the contents of that will they do not know: The question was, if the first will was revoked? *Finch* argued, that every later will is not a revocation, for a man by one will may dispose of one acre, and by another will of another acre: So if a man purchase lands after he has made his will, he need not make his will over again, but make another will as to these. *Vide* Cro. Car. 293. Therefore this other will might be of other lands, and no revocation, and the *aliud testamentum*

[1] Many authorities are collected in 1914 A Am. & Eng. Ann. Cas. 123 note and in 37 L. R. A. 561 note.

[2] See *Card* v. *Grinman,* 5 Conn. 164.

might be no revocation, but might be consistent. Cro. Eliz. 721; Cro. Car. 24. *Levinz*, contra, argued, that revocations are favored, because they are in the nature of restitution to the heir, and all restitutions are favored. *Vide* Dyer 310; Moor. 429; 1 Roll. 614. A deed of feoffment without livery, a bargain and sale without enrolment, a grant of a reversion without attornment will revoke a will, and yet these are void acts; but the reason is, that it appears now it was not the testator's intent that it should remain his will, the first will must be supposed to be perfect and include all; and if a man claims by devise, he must in pleading say, that the testator by his last will devised, &c. 44 Ass. 36; 2 Ric. 2, 3*b*. But the COURT were of opinion, that it was no revocation, and the *aliud testamentum* might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the House of Lords. *Vide* Hard. 374; Parl. Cases 146.[1]

[1] "A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property. 1 Jarman, Wills, *172. Hence, to show that the Rulo will was superseded, it would be necessary to prove that the later instrument revoked it expressly, or else to show that the contents of the later instrument were such as to revoke it by implication. There is no proof of an express revocation clause. To show revocation by implication requires more detailed evidence as to the contents of the lost will, for, unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later. 1 Jarman, Wills, *175. The governing principle is the intention of the testator. It does not follow from the fact of a new will that full and entire revocation was intended; the purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. *Brant* v. *Wilson*, 8 Cow. (N. Y.) 56; *Smith* v. *McChesney*, 15 N. J. Eq. 359; *In re Venable's Will*, 127 N. Car. 344, 37 S. E. 465. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments. Schouler, Wills, sec. 407; 1 Underhill, Wills, sec. 251. There are cases where, from the whole instrument, the court is able to say that the later was intended as an independent and final disposition of the testator's property. 1 Jarman, Wills, *175. But in order that a court may do this, with assurance, it must have the later instrument before it, so that the testator's language may be fully and accurately apprehended. Hence it was held in a number of early cases that it was not enough to find the existence of a subsequent will, but it must be found that the subsequent will differed from the former will, claimed to have been revoked, and that the nature of the difference must be found also. *Seymor* v. *Northwortly*, Hard. (Eng.) 374; *Goodright* v. *Harwood*, 3 Wils. (Eng.) 497; *Harwood* v. *Goodright*, 1 Cowp. (Eng.) 87, 89, 91. This rule has been adhered to. We may regard it as well settled that the mere fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will. 1 Williams, Executors, 162, 166; *Nelson* v. *McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Lane* v. *Hill*, 68 N. H. 275, 44 Atl. 393." — *Per* POUND, C., in *Williams* v. *Miles*, 68 Neb. 463, 476.

In re Will of Dunahugh, 130 Iowa, 692; *Williams* v. *Miles*, 87 Neb. 455; *Lane* v. *Hill*, 68 N. H. 275; *In re Cunnion*, 201 N. Y. 123; *Harwood* v. *Goodright*, Cowp. 87; *Cutto* v. *Gilbert*, 9 Moore, P. C. 131; *Hellier* v. *Hellier*, 9 P. D. 237, *accord*. *Bruce* v. *Sierra*, 175 Ala. 517, *contra*. Compare 1914 D Ann. & Eng. Ann. Cas. 130 note.

PLENTY *v.* WEST AND BUDD.

9 Jur. 458. 1845.

SIR HERBERT JENNER-FUST.[1] The question is, whether there is any rule of law binding upon the court to give effect to these papers, and so to prevent a partial intestacy. The circumstances of the case are these: The deceased left three testamentary papers, a will dated October 5, 1837, a will and codicil dated April 13, 1838. Probate has already been granted of the two papers dated in April, 1838, and the court is now asked to revoke that probate, and to decree probate of all three papers, as together containing the last will and testament of the deceased. The first observation, which the case suggests, is this, the deceased had practised as a solicitor, and had been clerk of the peace for the county of Berks, he must, therefore, be presumed to have known what would be a good and valid disposition of his property. The will of 1837 is very short, and contains a disposition of the whole of his property. The will of 1838 commences in these words: "This is the last will and testament of me, William Budd," so that it clearly purports to be his last will, and it is all in his own handwriting. However, it is true, that it contains only a partial, a very partial, disposition of his property, and if it stands alone, the deceased will be dead intestate with respect to the greater portion of his estate. Then, the third paper is this, "Of this my will, I appoint C. S. and W. W. executor and executrix. As witness my hand, the day and year above written." This is duly executed and written on the same sheet of paper as the will of 1838. So that this will of 1838 is twice declared by the testator to be his will, or last will, and I am asked to say, that it is not so, but that the will of 1837 is also a part of his last testament. I have heard no case cited from this court, which would enable me to pronounce such a sentence. Nor do I see how I am to declare that to be a part of a will, to which I find that the testator, in instruments of a later date, makes no reference whatever, and to which, as appears by the evidence, he made no allusion when he executed the subsequent papers. I have been referred to a rule which is said to exist with respect to real property, but I know of no such rule applying to personalty. I must collect the intention of the testator, as I best can, from all the circumstances of the case, and I can find nothing to show that he intended all three papers to be taken together. It is certainly desirable to avoid a partial intestacy; but the appointment of executors in the second paper, of 1838, is sufficient to make a complete will, for all the property of the deceased must pass through their hands. Looking, then, to the intention of the testator, and the absence of any case in these courts in support of the doctrine

[1] The opinion only is given.

contended for, I am of opinion, that the will of 1837 was, in fact, though not formally, revoked, and I direct the probates of the will and codicil of 1838 to be delivered out.[1]

IN RE VENABLE'S WILL.

127 N. C. 344. 1900.

APPLICATION by S. L. Venable for the probate of the holograph will of Haywood Venable, deceased, in connection with a subsequent will, heard by Judge W. S. O'B. ROBINSON, and a jury, at Spring Term, 1900, of Stokes Superior Court. From order denying probate, propounder appealed.

FAIRCLOTH, C. J. On August 29, 1891, Haywood Venable executed what purports to be his holograph will, found among his valuable papers, after his death. On March 15, 1899, he executed another will a few days before his death, which was probated and duly recorded on March 24, 1899. S. L. Venable, one of the devisees in the holograph will, offered the same for probate and recordation on May 13, 1899. An issue of *devisavit vel non* as to the holograph will was framed and submitted to a jury at Spring Term, 1900, of the Superior Court, whose verdict was against the propounder of the said will, and the judgment of the court was that said holograph paper was no part of the last will and testament of Haywood Venable, all devisees, legatees, and heirs of the testator having come in as caveators. Propounder appealed.

We will designate the holograph paper as the first will, and the once recorded, as the second will. The question submitted to this Court is, whether the second will revokes the first, or whether, taken together, they constitute the last will of Haywood Venable. We are not aware that this issue has ever been before this Court, and we must, therefore, rely upon our own reasoning and such outside authorities as we can find. Each paper starts off by declaring this to be "my last will and testament," and neither has a residuary clause. The first will declares all other wills void. The second has no express words of revocation. The second disposes of some property not mentioned or referred to in the first will. After the verdict was entered, the propounder moved the Court for judgment *non obstante veredicto* in favor of the first will, except as to provisions therein altered by the second will. This presents the whole question. During the trial the caveators were allowed to introduce parol evidence reciting the statements and declarations of the testator

[1] By the first will the testator gave all his real and personal estate to trustees to divide the same between three boys when they reached 21. By the second will he gave his household goods at Newbury to C; gave successive life estates in all his realty to several persons; and all his copyhold estate of Burghclere to B and his heirs. See the report of *Plenty* v. *West and Budd* in 1 Rob. Eccl. 264.

concerning his will. The admission of this evidence was error. "Parol evidence of the revocation of a will was held to be inadmissible." *Jackson* v. *Kniffin*, 2 Johns., 31; *Smith* v. *Fenner*, 1 Gall., 170, Fed. Cas. No. 13,046; Pritch. Wills, sec. 248. These are considered leading cases. The argument made was, that parol evidence is admissible to relieve latent ambiguities. The argument is correct, but it is a misapplication of the principle. We are not construing the meaning of these papers, but simply whether one revokes the other, without regard to the meaning of either, even if there was any ambiguity in them. Looking at these instruments, we can see no ambiguity in either. Each one names the devisee and legatee, and each sufficiently describes the property devised. In construing wills the intention of the testator must be ascertained from the face of the will when there is no latent ambiguity, and the intent to revoke one instrument by another is to be gathered in the same way. By revocation is meant the destruction of the operative force of the will, either in part or entirely, by some extrinsic act in regard to it, or by making and publishing a later instrument in the nature of a will *animo revocandi*. 29 Am. and Eng. Enc. Law, 266; *White* v. *Casten*, 46 N. C., 197. Some courts have held that revocation is accomplished by simply disposing of an estate in an inconsistent manner. Schouler, Wills, sec. 406. But, "on the other hand, the later will, though well executed, does not revoke the earlier one, as such, and without express words of revocation, except by being inconsistent with it; and by the extent of such inconsistency must be measured the extent of the revocation. To operate a total revocation in such a case, the two dispositions must be so plainly inconsistent as to be incapable of standing together. Only a revocation *pro tanto* results where the effect is that of partial inconsistency. It is like making a will and then adding a *codicil;* the final disposition reading by the light of both instruments together as a corrected whole." Schouler, Wills (2d Ed.), sec. 407; Pritch., Wills, sec. 248. The manner of revoking wills is discussed in various ways in Pritch., Wills, chap. 2, Art. I, secs. 243–263, and supports the principle we have above stated. The appointment or non-appointment of new executors, and the usual expression, "my last will and testament," [1] have little bearing on the issue. 1 Williams, Ex'rs, 164. Our opinion is that the first and last wills together constitute the will of the testator, and his estate must be administered accordingly. There is no express revocation, which is the usual and natural way of showing the intention. There is nothing more than partial inconsistency, and nothing is disclosed on the face of the last will to indicate a purpose to destroy the operation of the first will entirely.

[1] On the ineffectiveness of this expression as a revocation, see *Fry* v. *Fry*, 125 Iowa, 424; *Aldrich* v. *Aldrich*, 215 Mass. 164, 169; *Gordon* v. *Whitlock*, 92 Va. 723; *Cutto* v. *Gilbert*, 9 Moore, P. C. 131; *Freeman* v. *Freeman*, 5 De. G. M. & G. 704; *Leslie* v. *Leslie*, 6 Ir. Eq. 332. Compare *Simpson* v. *Foxon*, [1907] P. 54.

It may be that we have missed the testator's intention. If so, it was his misfortune not to have expressed it in direct terms, so that it could be understood. All we can do is to attempt to arrive at his intention according to the established rules of construction. There was error.

Reversed.[1]

[1] "It becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty* v. *West*, 1 Rob. Ecc. 264. There the court held upon all the facts before it, that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. The authority of that case has been stated by Sir E. V. Williams to be doubtful since the decision of the Privy Council in *Cutto* v. *Gilbert*, and Lord Penzance is said to have regarded it as overruled. The case of *Cutto* v. *Gilbert*, however, merely decides that the bare fact of a testator having executed an instrument as his last will and testament, the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious, for the missing instrument may have been confirmatory of the first (see Wms. Executors, p. 156, note *c*). It certainly does not appear from the judgment in that case, that there was any intention to overrule the decision in *Plenty* v. *West*. Dr. Lushington (9 Moore, P. C. at p. 146) says: 'Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for the uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true that Sir H. J. Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision.' The Judicial Committee thus appear to have approved of the decision in *Plenty* v. *West* upon the ground that the fact that the whole of the personal estate was not disposed of by the second will was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects essentially different. And Lord Penzance, in *Lemage* v. *Goodban*, does not say that *Plenty* v. *West* is overruled; but with his accustomed accuracy, only says, 'the case of *Plenty* v. *West*, so far as it supports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*.' Lord Penzance further says: 'The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the dispositions of the testator's property and not to the form of his will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question.' I followed that decision *In the Goods of Petchell*, L. R. 3 P. & M. 153. In that case I considered that the intention of the testatrix in the second will was to benefit her daughter by postponing the payment of the specific legacies until after the daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I therefore came to the conclusion that the original residuary bequest in her favor was not revoked.

LEMAGE *v.* GOODBAN AND OTHERS.

L. R. 1 P. & D. 57. 1865.

THIS was a cause of revoking a probate, which had been granted on motion, of the will of the testator, John Lemage, who died on the 25th of January, 1864, at an advanced age, a bachelor, without parent, leaving Rachael Lemage, his sister by the whole blood, and Marmaduke Lemage, the plaintiff, his brother by the half blood, his sole next of kin, and the only persons entitled in distribution to his personal estate, him surviving. He left freehold and leasehold property and personal effects of considerable value. There were discovered after his death only two finished testamentary papers, both in holograph, the earliest unattested, and dated the 24th of December, 1823, and the later one purporting to have been attested by three witnesses, and which, from the watermark and from internal evidence, as well as that of one of the attesting witnesses, must have been executed between the years 1827 and 1829.

The earliest will described in the proceedings as paper A was in the following terms: "In the name of God, Amen. I, John Lemage, of No. 31, Gloucester Street, in the parish of St. George's, &c., do make this my last will and testament in manner following: First, and principally, I commend my soul to God, &c., and as to such worldly estate as God of His goodness hath bestowed on me, I give

"Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny* v. *Barton*, 2 Phillim. 575. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29, says, 'the question is total revocation or partial revocation.' And on this question Sir J. Nicoll says, in *Methuen* v. *Methuen*, 2 Phillim. 426, 'In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court.' In the present case I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at that time to constitute her last will and testament and consequently that it does by implication revoke the whole of the will of 1858."—*Per* SIR J. HANNEN, in *Dempsey* v. *Lawson*, 2 P. D. 98, 105–107. See *Smith* v. *McChesney*, 15 N. J. Eq. 359; *Cadell* v. *Wilcocks*, [1898] P. 21.

On the admission of parol evidence to show that a subsequent testamentary instrument, which contains no clause of revocation, revokes an earlier will, see *Methuen* v. *Methuen*, 2 Phillim. 416; *Thorne* v. *Rooke*, 2 Curt. Eccl. 799; *Jenner* v. *Ffinch*, 5 P. D. 106; *Townsend* v. *Moore*, [1905] P. 66, 73, 80; *Estate of Bryan*, [1907] P. 125; *Estate of Vines*, [1910] P. 147.

As to when legacies to the same person in different instruments are to be taken as cumulative, and when the second legacy revokes the first, see *Dewitt* v. *Yates*, 10 Johns. 156; *Hurst* v. *Beach*, 5 Madd. 351; 1 Williams, Exec. (10th ed.), pp. 1035–1041.

and dispose thereof as follows — that is to say, I give and devise unto and to the sole use of my dear sister, Rachael Lemage, spinster, at present residing at, &c., to her, her heirs and assigns, all and everything which I may possess in the world at the time of my decease, namely, my freehold house, situated and being No. 10, Great Earl Street, Seven Dials; also my leasehold estate, situate and being No. 54, St. John Street Road, &c.; likewise all the money that I may possess, whether in cash or bonds as security for money, such as India Bonds, Danish Bonds, Spanish Bonds, together with seven hundred and fifty-one rentes in the French Funds, and being inscribed in the great book as above, with all interests on rentes which may be due on the aforesaid. I likewise bequeath to dear sister before-named all my household furniture, plate, linen, china, watch, chain, seals, or trinkets of any kind belonging to me, also all my books, prints, paintings, mathematical and philosophical instruments, wearing apparel, &c., &c., &c.; and do hereby appoint and make my dear sister, the aforesaid Rachael Lemage, my whole and sole executrix, requesting her to pay the expense of my funeral out of the effects, together with a bond held by my father from me for £400 sterling, should he demand the same, the said bond being the only one which I owe, nor any debts, except for rent, which will only be from the preceding quarter day. If from my ignorance of the law I should have omitted anything, I here repeat that it is my wish and most solemn will that my dear sister, Rachael Lemage, shall come into possession of everything which I may possess at my decease. This 24th day of December, 1823 — John Lemage."

The later will, described as paper B, was as follows: "In the name of God, Amen. I, John Lemage, of No. 31, Gloucester Street, Queen's Square, &c., *do make this my last will and testament in manner and form following:* I give, devise, and bequeath unto my dear sister, Rachael Lemage, spinster, the whole of my moneys and securities for moneys whatsoever and wheresoever, as the whole of money inscribed in my name in the great book in the Bank of France, about seven hundred and fifty-one rentes, or whatever it may be; also all bonds of whatever description. I further give unto my sister aforesaid my leasehold house in St. John Street Road. I also give and devise and bequeath unto my sister my half-share of the freehold house left me by my father in Earl Street, Seven Dials. I also give unto my sister aforesaid the annuity or rent-charge secured to me by Maria Lemage, widow of my father, on my said father's estate. I likewise give unto my sister aforesaid all my plate, linen, and china, philosophical instruments, *and effects of every kind and description, together* with the whole of the above specified for her use, or her heirs, executors, administrators, or assigns forever, according to the description thereof, that is, the said property. I do further devise and bequeath unto my sister aforesaid, or to her heirs, executors, administrators, or assigns, my share or portion of

the money that shall be produced from the sale of the estate of my father, which he directed by his will to be divided among his six children, as described, or to their heirs, executors, administrators, and assigns. I *further distinctly state that if I have omitted any legal point or form, that is my intention that my sister Rachael Lemage shall die possessed of, for her own use and disposal, how to whom she pleases.* And I do hereby nominate and appoint my sister whole and sole executrix to this my last will and testament. (S. D.) J. Lemage. Signed, sealed, declared, and published by the abovenamed John Lemage, as and for his last will and testament, in the presence of us, who at his request and in his presence have subscribed our names as witnesses. (S. D.) George Charlton; (S. D.) Joseph Wellsher; (S. D.) Henry Easton."

On the 26th day of April, 1864, Rachael Lemage, without notice to the plaintiff, who was then unaware of his half-brother's death, obtained a decree on motion, for probate of the two papers A and B, as together containing the last will of the testator, to be granted to her, and afterwards took probate thereof as sole executrix. Rachael Lemage shortly afterwards died. The plaintiff subsequently, upon ascertaining what had been done, extracted a citation from the registry calling upon the executors of Rachael Lemage to bring in the probate and shew cause why it should not be revoked, and probate granted of the last will only.

The defendants, the executors of Rachael Lemage, appeared to the citation, and delivered a declaration wherein they alleged, "that the testator wrote and signed the paper writing bearing date the 23d day of December, 1823, and now in the registry of the court, and marked A, beginning thus, &c., and ending thus, &c., that at some time subsequent thereto, and prior to the year 1830, he duly signed the paper writing marked B now remaining in the registry of this court, beginning thus, &c., and ending thus, &c., and subscribed the same in the presence of three witnesses, and alleged his capacity at the time of the execution of the two paper writings, and that the said paper writings A and B together contain the last will and testament of the said testator; and that on the 7th day of January, 1864, probate of the last will and testament, as contained in the said paper writings A and B, was granted to the said Rachael Lemage by the principal registry after the court had been moved to make the said grant. That the said Rachael Lemage died on, &c., leaving a will, whereby she appointed the defendants executors, who had duly proved the same. The plaintiff by his pleas,

1. Denied that the said paper writings marked A and B together contained the last will and testament of the testator, as in the declaration alleged.

2. That the said paper writing marked A was revoked by the said paper writing marked B; upon which pleas issue was joined.

Cur. adv. vult.

SIR J. P. WILDE. After carefully considering the authorities cited in argument, I retain the opinion expressed on the *ex parte* application for probate. The case of *Plenty* v. *West*, 1 Rob. Ecc. 204, so far as it supports the doctrine, that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*, 9 Moore, P. C., and *Stoddart* v. *Grant*, 1 Macq., and the case of *Henfrey* v. *Henfrey*, 4 Moore, P. C. 29, only decides that, a second will disposing of the whole estate revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says, "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the Statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers, will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the "intention" to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend? — not which, or what number, of papers did he desire or expect to be admitted to probate, — is the true question. And so this court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what

dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain. In this case such a task is not difficult. The first paper makes the testator's sister the sole object of bounty and residuary legatee. The second is to the like general effect; no new object of bounty is introduced, and the sole reason for its execution seems to have been, that the testator's father had died in the interval, and that half a freehold house, and a share of personalty, had devolved on him by that event. These new acquisitions he devises and bequeaths in the same direction. But the residue is not disposed of, the clause apparently intended for that purpose being defective in its language, and not reading sensibly. The court, can, however, see thus far into the intent of that clause — that the object of it was the same sister whose name alone appears in both papers. It would not be reasonable, under such circumstances, to conclude that the testator intended to revoke the residuary bequest in the first paper, and as effect can only be given to that disposition by granting probate of the first and second papers as together constituting the will — The COURT so decides. I pronounce for the two papers.

Dr. Tristam asked for the plaintiffs' costs, to be paid out of the estate.

Dr. Spinks, contra.

SIR J. P. WILDE. Acting upon the rule I have laid down for my own guidance, I think that the plaintiff's costs should be paid out of the estate. The litigation was justified by the state in which the testator left his testamentary papers.[1]

IN RE STEINER'S WILL.

152 N. Y. Supp. 725. 1915.

COHALAN, S. Robert J. Steiner drafted his own will and executed it September 16, 1913. The beneficiaries are his two brothers and certain of his friends. When the paper was executed the testator was evidently contemplating matrimony with the young woman whom he subsequently married January 17, 1914. The testator died April 13, 1914, without executing any other testamentary instrument. No issue survived him. In the instrument propounded for probate is the following provision:

"This will to be regarded as canceled the day I will enter matrimony."

The widow of the deceased contests the validity of the will upon the sole ground that it became void by the performance of the condition upon which the cancellation or revocation of the instrument was made dependent. There can be no doubt that upon its execution the paper propounded became a lawful disposition of the testa-

[1] See *Tynan* v. *Paschal*, 27 Tex. 286, 303; *Goods of Durance*, L. R. 2 P. & D. 406; *Toomer* v. *Sobinska*, [1907] P. 106.

tor's property to take effect at his death, provided he died unmarried without making another will or revoking the will already made. If the testator had died between the time of the execution of the instrument and his marriage, the instrument undoubtedly would have been effective, as a will, without the happening of any other condition or contingency. Therefore the paper offered for probate is not a contingent or conditional will.

The will, once duly executed, could only be canceled or revoked in the manner provided by statute. The statute (Decedent Estate Law, § 34) provides that:

"No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some *other* will in writing, or some *other writing* of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

This will was not effectively "canceled," because the intended cancellation was not done in the particular manner prescribed by the above statute. If the attempted cancellation be considered a revocation, the statute again stands in the way, because it is specifically provided therein that a will can be revoked only by "some other will" or by "some other wiritng" of the testator "executed with the same formalities with which the will itself was required by law to be executed."

It is earnestly contended by the contestant that the testamentary act of the testator should be given the same legal effect as though he had said: "If I die unmarried, this shall be my will." A sufficient answer to this contention is the fact that the provisions of the will itself and the testimony show that the testator did not make a conditional or contingent will. Assuming that the testator believed that his marriage had revoked or canceled his will, and that it was his desire to provide for his wife in another will or to leave her provided for by his dying intestate, such intention would have no more effect in law than that of a testator who had drawn his own will in disregard of the statute of wills. In either case it is well settled that it is the intent of the Legislature, and not the intent of the testator, which must prevail. There is the same necessity in both cases for a substantial compliance with the statutes.

I am therefore constrained to admit to probate the instrument offered as the last will and testament of the deceased. Submit decision and decree, and tax costs on notice.

Probate decreed.[1]

[1] But see *Folsom* v. *Board of Trustees*, 210 Ill. 404.

B. *By Act to the Document.*

DOE d. REED *v.* HARRIS.

6 A. & E. 209. 1837.

EJECTMENT for messuages and other premises. On the trial before PATTESON, J., at the Glamorganshire Summer Assizes, 1835, it appeared that the lessor of the plaintiff claimed as son and heir-at-law, the defendant as devisee, of John Reed. The will was duly executed in August, 1832. The testator died December 31st, 1834. He was an old and infirm man: the defendant was his niece, and lived with him as his housekeeper. She exercised great influence over him; but it appeared that they had violent quarrels, and that he sometimes spoke of her to other persons in very abusive terms, and said that he feared danger to his life from her. A witness named Esther Treharne, who had been the testator's servant, stated that, about a month before he died, she was shaking up the cushion of his easy-chair, and observed, under the cushion, a folded paper. It was brown or cartridge paper, and the corner of it was burned. Shortly after, on the same day, Alice Harris went out; and, while she was away, the testator inquired for the paper: the witness told him where she had seen it, upon which he exclaimed that Alice had gone away with the will; and, on his then removing the cushion, the will appeared no longer. He then told the witness that he had sent Alice Harris to fetch the will to him, that he had looked into it, and that, when he had seen it, he had thrown it on the fire; and that Alice had "scramped" it off the fire. This appeared to have taken place the evening before. After the above conversation, Alice Harris returned; and, when she and the testator retired at night (both sleeping in the same room), the witness heard a quarrel, and blows; and, upon her going into the room, the testator said that Alice Harris would not give him his will. Alice went downstairs with the witness, and the latter urged her to give up the will; but she said she would not; that she had given it him last night, and he threw it on the fire; and that she would rather have the pleasure of burning it herself, and would do so the next morning. After this conversation she returned to the testator, on the witness's persuasion, begged his pardon, and promised to burn the will the following morning. The next morning, the witness, going into the kitchen where Alice and the testator were, heard Alice say, "There, everything is finished"; and the testator then told the witness that Alice had thrown the will upon the fire. The witness doubting it, he said, "She threw something with writing upon it on the fire; but I did not have it in my hand to look at it." The witness answered, "I do not think she has thrown it"; and the testator said, "I do not care; I will go to Lantwit, if I am alive and well, and

make another will"; adding that Alice Harris should not have his property, and that he had a son nearer to him than her. He also said (as he did on many other occasions) that the will was one made by Alice and Mr. R. (the attorney who prepared it), and that R. was a thief, and wanted, with Alice, to get everything he had. Alice Harris, in an affidavit exhibited in the Prerogative Court, stated that, on January 1st, 1835, she found the will in a trunk used by the testator for holding his deeds and papers, and kept in his dressing-room. The will produced on the trial had no mark of fire. It did not appear that any envelope had been found upon it. The plaintiff's counsel contended, first, that the testator had been prevailed upon to execute the will by importunities of such a nature as to deprive him of his free agency; and, secondly, that, assuming the will to have been properly executed, the evidence showed a cancellation within the Statute of Frauds, 29 Car. 2, *c.* 3 § 6. The learned judge stated to the jury, on the latter point, that, if they believed the evidence of Esther Treharne, and were satisfied that the testator threw the will on the fire intending to burn it, that Alice Harris took it off against his will, that he afterwards insisted on its being thrown on the fire again, with intent that it should be burned, and that she then promised to burn it, there was a sufficient cancellation within the Statute. The jury found for the plaintiff, not stating the grounds of their verdict. In the ensuing term a rule *nisi* was obtained for a new trial, on account of misdirection on the two points above stated. It was also objected that the evidence of cancellation was not of a proper kind; the fact being proved only by declarations, and not by the testimony of eye-witnesses, or by marks of cancellation on the will itself; and *Willis* v. *Newham*, 3 Y. & J. 518, was referred to as an analogous case.

Lord Denman, C. J. The Statute of Frauds requires that a will shall be executed with certain solemnities; and, after prescribing these, directs how it shall be revoked; and that is by certain acts, which are specified. In the present case, there is no evidence that any one of those acts has been done. It is impossible to say that singeing a cover is burning a will within the meaning of the Statute. The terms used in the sixth section show that to assert this would be going a length not contemplated in the Statute. The acts required are palpable and visible ones. Cases may, indeed, be put where very little has been done, as a slight tearing and burning, and yet a revocation has taken place; but the main current of the Statute is against the argument from such cases. The intention seems to have been to prevent inferences being drawn from such slight circumstances. In *Bibb dem. Mole* v. *Thomas*, 2 W. Bl. 1043, the will was slightly torn and slightly burned: and the court said that the case fell within two of the specific acts described by the Statute; there was both a burning and a tearing. Doubt might be entertained now whether the proof there given would be sufficient

as to these; but, as the court considered what was done to have been a burning and a tearing, the case shows at least that they did not think the acts required by the Statute could be dispensed with by reason of the conduct of a third party. In *Doe dem. Perkes* v. *Perkes*, 3 B. & Ald. 489, the testator's hand was arrested while he was in the act of tearing the will: he submitted to the interference; and the intention of revoking was itself revoked before the act was complete. There it was properly left to the jury to say whether the testator had done all he intended or not. Neither of these cases at all approaches the present. It would be a violence to language, if we said here that there was any evidence to go to the jury of the will having been burned. Great inconvenience would be introduced by holding that there may be a virtual compliance with the Statute; but there is none in saying that, if a testator perseveres in the intention of revoking his will, he shall fulfil it by some of the means pointed out in the Statute; that he shall revoke the will, if not in his possession, by writing properly attested; or cancel it, if in his power, by some of the other acts which the Statute prescribes.

COLERIDGE, J. The kind of construction which has been insisted upon would lead to a repeal of the Statute on this subject, step by step. The Statute, for wise purposes, does not leave the fact of cancellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so, when a will has been made, to revoke it, there must be some act coupled with the intention of revoking, to bring the case within the sixth section. The question is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say: but there must be such an injury with intent to revoke as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was. Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party. But, to instance another case under the same clause of the Statute, suppose the testator had written his revocation, and that, by the act of some other party, he had been prevented from signing, or the witnesses had been prevented from attesting it; could it be said that the testator had done all that lay in him, and therefore the act of revocation was complete? We must proceed on such a view of the Statute as accords with common-sense. *Rule absolute.*[1]

[1] The concurring opinions of Patterson, J., and Williams, J., are omitted.

NOTE. — Where revocation of a will is prevented by fraud of a devisee or legatee the probate court will nevertheless not refuse probate. *Estate of Silva*, 169 Cal. 116; *Runkle* v. *Gates*, 11 Ind. 95 (*semble*); *Gains* v. *Gains*, 2 A. K. Marsh. 190; *Trice* v. *Shipton*, 113 Ky. 102; *Graham* v. *Burch*, 53 Minn. 17; *Mundy* v. *Mundy*, 15 N. J. Eq. 290; *Hise* v. *Fincher*, 10 Ired. 139; *Kent* v. *Mchaffey*, 10 Ohio St. 204; *Clingan* v. *Michel-tree*, 31 Pa. 25 (*semble*); *Blanchard* v. *Blanchard*, 32 Vt. 62. *Pryor* v. *Coggin*, 17 Ga. 444; *Smiley* v. *Gambill*, 2 Head 164, *contra*. The fraudulent devisee or legatee will,

BIBB d. MOLE AND WIFE *v.* THOMAS.

2 W. Bl. 1043. 1775.

EJECTMENT. On trial before HOTHAM, Baron, the question was, Whether a will made by one William Palin was duly revoked? It appeared in evidence that Palin (who had for two months together frequently declared himself discontented with his will), being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumpled it together, and threw it on the fire; but it fell off. However, it must soon have been burned, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times afterwards said, "That was not and should not be his will," and bid her destroy it. She said at first, "So I will, when you have made another"; but afterwards, upon his repeated inquiries, she told him she had destroyed it (though in fact it was never destroyed), and she believed he imagined it was so. She asked him, when the will was burned, whom his estate would go to? He answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other till he had seen his brother, John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "Dear Brother, — I have destroyed my will which I made, for upon serious consideration I was not easy in my mind about that will." Afterwards desires him "to come down, for if I die intestate it will cause uneasiness." He however died, without making any other will. The jury, with whom the

however, be held a constructive trustee in equity for those who would have been entitled to the estate in case the will had been revoked. *Gains* v. *Gains*, 2 A. K. Marsh. 190 (*semble*); *Blanchard* v. *Blanchard*, 32 Vt. 62 (*semble*); *Dixon* v. *Olmius*, 1 Cox Ch. 414. *Bohleber* v. *Rebstock*, 255 Ill. 53; *Kent* v. *Mehaffey*, 10 Ohio St. 204 (*semble*) *contra*.

For cases on the liability in equity of an heir, a devisee, or legatee who induces the deceased to refrain from making a will, to make a will, or to refrain from revoking a will, see an article by Prof. G. P. Costigan Jr. in 28 Harv. Law Rev. 237, 366; Scott's Cas. on Resulting and Constructive Trusts, pp. 66–95.

In *Riggs* v. *Palmer*, 115 N. Y. 506, a testator made a will leaving property to his grandson, who murdered the testator to prevent revocation of the will and to get immediate possession of the property. After the will had been admitted to probate, the grandson was convicted of murder. Action was then brought to have probate of the will, so far as it made provision for the murderer, annulled. The court held that the grandson was deprived of any interest in the estate of his victim whether as donee under the will, or as heir, or as next of kin. See Ames, Lectures on Legal History, p. 310; Scott's Cas. on Resulting and Constructive Trusts, p. 95.

judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the plaintiff, the lessee of the heir-at-law.

And PER TOTAM CURIAM (DE GREY, C. J., GOULD, BLACKSTONE, and NARES, JJ.). This is a sufficient revocation. A revocation under the Statute may be effected, either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself, viz., burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent. But these must be done *animo revocandi*. *Onions and Tyrer*, 1 P. Wms. 343; *Hyde and Hyde*, 1 Equ. Cas. Abr. 409. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The Statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself, be totally destroyed or consumed, burned, or torn to pieces. The present case falls within two of the specific acts described by the Statute. It is both a burning and a tearing. Throwing it on the fire, with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the Statute. *Rule discharged.*[1]

WILL OF LADD.

60 Wis. 187. 1884.

APPEAL from the Circuit Court for Grant County.

The case is thus stated by Mr. JUSTICE CASSODAY: —

"It appears from the record and, in fact, is admitted by all parties and, in effect, found by the court, that the will of the testatrix was duly made, executed, attested, witnessed, published, and declared as a will, July 29, 1870, in the State of New York, but in strict conformity with our Statutes, and that the will is entitled to probate, if not revoked; that the paper upon which the will was written was a very large, thick, double sheet, the first page of which was originally a printed blank form of a will, the blanks of which were filled up with the writing; that the written and printed parts constituting the will were wholly upon the first page; that nothing was written or printed upon the second or third page of the sheet, — they being entirely blank; that the usual indorsement by the scrivener was upon the fourth or outside page of the wrapper leaf, and upon which there was also written in pencil, in the handwriting of the testatrix, the words: '*I revoke this will. Mary P. Ladd, October* 7, 1879.'

[1] See *White* v. *Casten*, 1 Jones Law 197.

"October 7, 1882, the testatrix died, in Grant county, Wisconsin, where she then, and for several years had, had her residence and domicile. The testatrix retained the will until her death, when it was found in the bottom of her trunk, tied up with her decree of divorce, and covered with a newspaper. The Circuit Court, affirming the decision of the County Court, held that the will was revoked by the writing in pencil, and judgment was entered accordingly."

From that judgment Arthur Sherman, the proponent and one of the residuary legatees under the will, appealed.

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in *Cole* v. *Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and that the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to *Mathews* v. *Warner*, 4 Ves. Jr. 196; *Prince* v. *Hazelton*, 20 Johns. 513. This remark and that trial led to the enactment of the Statute of 29 Chas. II., "for the prevention of frauds and perjuries," in the following year. 3 St. at Large, p. 385, ch. 3. In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in *Ash* v. *Abdy*, 3 Swanst. 664; 4 Lives Ld. Ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our Statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise sec. 2290, R. S., is substantially the same as that of sec. 6. The Statute is imperative upon the court, and is to the effect that "no will, *nor any part thereof*, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *cancelling*, or (4) *obliterating* the same *with the intention of revoking it*, by the testator, * * * or by some other (5) *will* or (6) *codicil* in *writing*, executed as prescribed in this chapter, or (7) by some other *writing, signed, attested*, and *subscribed* in the *manner provided* in this chapter *for the execution of a will*." Sec. 2290, R. S.

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be in *writing* and *signed*, but also *attested* and *subscribed in the presence of the testator by two* or more competent witnesses. Sec. 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by any witness, much less by two witnesses

in the presence of the testatrix. This failure to execute in the manner prescribed by the Statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page, — the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing *words* disclosing an *intent to revoke*, it must be held to be a "*cancellation*" of the will, "with the intention of revoking it," within the meaning of those words as used in the Statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the Statute? Would such a construction prevent "frauds and perjuries," according to the original intention of those who enacted the Statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper as was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained as perfect as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was cancelled, within the intent of the Statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the Statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. *Burtenshaw* v. *Gilbert*, 1 Cowp. 49; *Doe* v. *Harris*, 6 Ad. & El. 209; *Francis* v. *Grover*, 5 Hare, 39; *Price* v. *Powell*, 3 Hurl. & N. 341; *Giles* v. *Warren*, 3 Eng. (Moak), 478; *White* v. *Casten*, 1 Jones Law, 197; *Means* v. *Moore*, Harper (S. C.), 314; *Cheese* v. *Lovejoy*, L. R. 2

Prob. Div. 251; s. c. 21 Eng. (Moak), 633; *Swinton* v. *Bailey*, L. R. 4 App. Cas. 70; s. c. 33 Eng. (Moak), 48; *Evans's Appeal*, 58 Pa. St. 238.

In *White* v. *Casten*, *supra*, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. *Burtenshaw* v. *Gilbert*, 1 Cowp. 52; *Francis* v. *Grover*, 5 Hare, 39; *Lock* v. *James*, 13 Law J. Exch. 186; *Elms* v. *Elms*, 4 Jur. (N. S.), 765; *Bigge* v. *Bigge*, 9 Jur. 192; *Clarke* v. *Scripps*, 16 Jur. 783; *Giles* v. *Warren*, 3 Eng. (Moak), 478. So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating, done to the will itself, is not enough. *Doe* v. *Harris*, 6 Ad. & El. 209; *Hise* v. *Fincher*, 10 Ired. Law, 139; *Mundy* v. *Mundy*, 15 N. J. Eq. 290; *Gains* v. *Gains*, 2 A. K. Marsh. 190; *Runkle* v. *Gates*, 11 Ind. 95; *Perjue* v. *Perjue*, 4 Iowa, 520; *Heirs of Blanchard* v. *Heirs of Blanchard*, 32 Vt. 62; *Clingan* v. *Mitcheltree*, 31 Pa. St. 25.

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will, it shall have that effect. *Pryor* v. *Coggin*, 17 Ga. 444; *Smiley* v. *Gambill*, 2 Head, 164. The case in Head was put on the ground that there was no such statute in Tennessee, and the case in Georgia fails to refer to any statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by statute. But see *In re Wilson's Will*, 8 Wis. 171; *Allen* v. *McPherson*, 5 Beav. 469; s. c. 1 Phil. Ch. 133; s. c. 1. H. L. Cas. 191; *Gaines* v. *Chew*, 2 How. 619, 645; *Malin* v. *Malin*, 1 Wend. 625. The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the Statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the Statute. *Kirke* v. *Kirke*, 4 Russ. Ch. 441, 451; *Locke* v. *James*, 13 Law J. Exch. 186; s. c. 11 Mees. & W. 901; *Jackson* v. *Holloway*, 7 Johns. 394; *Hairston* v. *Hairston*, 30 Miss. 303; *Lewis* v. *Lewis*, 2 Watts & S. 455; *In re Penniman's Will*, 20 Minn. 245;

Laughton v. *Atkins*, 1 Pick. 535; *Cheese* v. *Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. (Moak), 633.

In *Kirke* v. *Kirke*, *supra*, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In *Locke* v. *James*, *supra*, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, *signed by him in the presence of one witness only:* "The alterations in the first and second sheet, all relating to the said annuities left to my daughter E. J. and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N."; — and PARKE, B., speaking for the court, said that the "rent-charge of £600 per annum, created by the will, duly executed and attested, . . . has not been cancelled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore *cannot even be looked at*, so far as the real estate is concerned."

In *Jackson* v. *Holloway*, *supra*, the testator, after having erased certain words and interlined others in place of them, and "at the same time *indorsed on the will* an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of *two* persons, who also signed the same as witnesses in his presence. But because there were not *three* instead of *two* witnesses, as required by the Statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In *Lewis* v. *Lewis*, *supra*, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Laughton* v. *Atkins*, *supra*, it was strongly intimated, if not held, that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In *Cheese* v. *Lovejoy*, *supra*, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English

Statute, were not satisfied. But that Statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of *Swinton* v. *Bailey*, *supra*, the will was made prior to the Statute of Victoria, and the case was decided under the old Statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans's Appeal*, 58 Pa. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. Then followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testator of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. *In re Cooke*, 5 Notes Cas. 390; *Price* v. *Powell*, 3 Hurl. & N. 341; *In re Simpson*, 5 Jur. (N. S.), 1366; *In re James*, 7 Jur. (N. S.), 52; *In re Gullon*, 4 Jur. (N. S.), 196; *Avery* v. *Pixley*, 4 Mass. 460; *Mence* v. *Mence*, 18 Ves. Jr. 348. The case of *Woodfill* v. *Patton*, 76 Ind. 375, cited by counsel, was under a different Statute, and hence is not applicable. The same is true of the recent case of *Lovell* v. *Quitman*, 88 N. Y. 377. See *Gay* v. *Gay*, 60 Iowa, 415, which was also under a different Statute.

The learned judge writing the opinion in *Evans's Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect [revocation], it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried

into execution by acts done to the paper. . . . Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "cancelled," written thereon, and said, "*I think* a repeal [a revocation of the will] is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for *himself*, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing," unless it "be complete, executed, and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. *Lewis* v. *Lewis, supra.* True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish *Evans's Appeal* from the case before us, and make *Lewis* v. *Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner* v. *Warner's Estate*, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the Statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some of the best adjudicated cases. Besides, the case is condemned

by one of our ablest text writers on the subject. 1 Redf. on Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the Statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "*intention*" of revoking the will. It is the language — the expression by written words alone — which is thus sought to be made effectual; whereas the Statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in *Evans's Appeal*, *supra*, and here repeated, to the effect that the word "cancelling" in the Statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible, but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by Statute, and the mode of revoking wills is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c., fixed by Statute, furnishes no ground for holding that a will, though not included in such Statutes, may also be cancelled in the same way. Our Statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written,[1] but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ;* besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. *Jackson* v. *Kniffen*, 2 Johns. 31; *Waterman* v. *Whitney*, 11 N. Y. 157; *Staines* v. *Stewart*, 8 Jur. (N. S.), 440; *Boylan* v. *Meeker*, 28 N. J. Law, 274; *Har-*

[1] As to such declarations, see 3 Wigmore, Evidence, § 1782; 24 L. R. A. N. S. 180.

groves v. *Redd*, 43 Ga. 142; *Runkle* v. *Gates*, 11 Ind. 95.[1] The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in *Southworth* v. *Adams*, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling, or obliterating the will before its completion, leaving the will so that its contents could still be read, that it might nevertheless be admitted to probate. *Doe* v. *Perkes*, 3 Barn. & Ald. 489; *Doe* v. *Harris*, 6 Ad. & El. 209; *Giles* v. *Warren*, 3 Eng. (Moak), 478.

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. *Short* v. *Smith*, 4 East, 418; *Kirke* v. *Kirke*, 4 Russ. Ch. 435; *Martins* v. *Gardiner*, 8 Sim. 73; *Locke* v. *James*, 13 L. J. Exch. 186; *Jackson* v. *Holloway*, 7 Johns. 394; *McPherson* v. *Clark*, 3 Bradf. Surr. 92; *Wolf* v. *Bollinger*, 62 Ill. 368; *Wright* v. *Wright*, 5 Ind. 389; *In re Penniman's Will*, 20 Minn. 245; *Quinn* v. *Quinn*, 1 Thomp. & C. 437; *Wheeler* v. *Bent*, 7 Pick. 61.

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

BY THE COURT. *Ordered accordingly.*[2]

[1] And see *Thoekmorton* v. *Holt*, 180 U. S. 552; *In re Colbert's Estate*, 31 Mont. 461; *Matter of Kennedy*, 167 N. Y. 163. But compare *Burton* v. *Wylde*, 261 Ill. 397; *Aldrich* v. *Aldrich*, 215 Mass. 164; *Managle* v. *Parker*, 75 N. H. 139; *In re Shelton's Will*, 143 N. C. 218; *Barfield* v. *Carr*, 169 N. C. 574. Many authorities are collected in 3 Wigmore, Evidence, §§ 1736, 1737; 26 Harv. Law Rev. 159; 10 Am. & Eng. Ann. Cas. 535 note; 24 L. R. A. N. S. 180.

[2] Compare *Howard* v. *Hunter*, 115 Ga. 357; *Lewis* v. *Lewis*, 2 Watts & S. 455; *Cheese* v. *Lovejoy*, 2 P. D. 251. But see *Evans's Appeal*, 58 Pa. 238; *Billington* v. *Jones*, 108 Tenn. 234; *Warner* v. *Warner*, 37 Vt. 356.

The opinion in *Oetjen* v. *Oetjen*, 115 Ga. 1004, is as follows:

COBB, J. In the case of *Howard* v. *Hunter*, 115 Ga. 357, this court held that in order for a written entry upon a will to operate as a revocation thereof, it must have either been attested in the same manner and with the same formality as is required for the execution of a will, or the entry must have been written upon the will in such a manner as to obliterate or cancel some material portion of the will. The facts of the present case are almost identical with those of the case just referred to; the only difference being that one word of the entry in the present case was written across one word in the last line of the will. This word was in a sentence which stated merely that a word in the will had been changed before signing. It thus appears that no material portion of the will was obliterated, even if the mere writing across a word in a will, leaving the same perfectly legible, could be said to be an obliteration or can-

DOE d. PERKES *v.* PERKES AND OTHERS.

3 B. & Ald. 489. 1820.

EJECTMENT for messuages and lands in the parish of Walsall. Plea, Not guilty. At the trial before HOLROYD, J., at the last assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir-at-law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall, "Joe, you shall see if I have done anything for the rascal or not. I have made him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands together, as if in an attitude of prayer, and said, "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will; and now

W. E. Taunton moved for a new trial, and contended that the cancellation was complete by the tearing of the will with the intent to destroy it. . . .

ABBOTT, C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his

cellation within the meaning of the statute which provides that a will may be revoked by cancelling some material portion thereof. The case is upon its facts absolutely controlled by the decision in *Howard* v. *Hunter*.

On cancellation when made with a pencil, see *McIntyre* v. *McIntyre*, 120 Ga. 67; *Hilyard* v. *Wood*, 71 N. J. Eq. 214; *Francis* v. *Grover*, 5 Hare 39; *Goods of Hall*, L. R. 2 P. & D. 256.

arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no farther, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now, if the cancellation had been once complete nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong. *Rule refused.*[1]

EMERNECKER'S ESTATE.

218 Pa. 369. 1907.

APPEAL from decree of O. C. Phila, Co., dismissing appeal from register of wills (refusing probate of copy of will).

Appeal from register of wills.

PENROSE, J., filed an opinion in part as follows:[2]

The petition for appeal avers that the decedent died May 13, 1905; that on July 16, 1903, she executed a will giving all her estate, real and personal, to her granddaughter, the petitioner, who, from the time she was thirteen years old, had lived with and given to her her wages and had aided in supporting her. . . .

When the will was drawn, the testatrix, an elderly German woman, was under the impression that the provision in favor of her granddaughter to the exclusion of her children and other grandchildren, would be invalid unless she gave a nominal amount, at least, to each of those so excluded; but upon the assurance of Mr. Braun, by whom it was drawn, that this was unnecessary, she executed it in the presence of two witnesses.

Notwithstanding this she appears to have been uneasy on the subject, and, in April, 1905, about three weeks before her death, she had a conversation with Mrs. Scheidt, an old friend, who told her that the will was not good because of the omission of gifts to her children of at least $1.00.

A week or ten days later, in a conversation with another friend, Mrs. Bolst, she spoke of her will with reference to what Mrs. Scheidt had said to her on the subject, and declared that she would "make another will so that nobody will be able to take anything from the property what she knows she wished to will to Ellie." She then, in the presence of Mrs. Bolst, tore the will up and threw the pieces

[1] Concurring opinions of Bayley, J., Holroyd, J., and Best, J., are omitted.

NOTE. — See *Safe Deposit & Trust Co.* v. *Thom*, 117 Md. 154.

[2] Part of this opinion as printed in the original report is omitted.

into the fire, saying to her that "on the first fine day" they (the decedent and Mrs. Bolst, who also wanted to have her own will drawn) would go to "Ladner, to Eighth and Green," to have him "draw a new will," in which she would give to each of her children $1.00, "and for Ellie everything she had in her possession because she was working for her."

At this time the decedent appeared to be in perfect health, but when, about a week later, on Friday morning, Mrs. Bolst called to go with her to Mr. Ladner's, she found that she had been taken sick the previous night. She died the next day.

PER CURIAM, May 20, 1907:

This case affords an illustration that may almost be called pathetic, of the persistency of popular error. The notion that to disinherit the heir he must be "cut off with a shilling" (for the probable origin of which see Newlin's Estate 209 Pa. 456), started more than 300 years ago, never was the law either in England or Pennsylvania, and yet survives with such potency as to lead to results apparently as unjust as they were unintended.

The undisputed facts of this case do not admit of any question as to the legal result, however much we may be impressed that the testatrix's act was induced by an erroneous belief as to the law. She intentionally destroyed the will, and declared she had done so with intent to make another. She knew what she was doing and the effect of it, and she did it *animo revocandi*, with intent to produce that effect. Her reasons were not matter of inquiry for the court. Whether, if she had felt sure that the will already executed would accomplish what she wanted to do she would have changed it, we may speculate but we do not know. As was well said by the learned judge below, "She was aware that, until this new will was executed, she was without any will at all, and the time of execution was left indefinite. Her friend was to call the 'first fine day' to go with her to have it drawn. This was merely the expression of an unwritten intention to do something in the future, and no matter how fully her mind was then made up, there might be a change of intention at any time before it was permanently expressed in writing. And whether the intended provision for her children would be substantial or merely nominal cannot be known. A will giving even a dollar to each child would be a different will from the one destroyed, and the dollar so given could be demanded by the legatees."

It seems to be a hard case, but there is no remedy without making the bad law which such cases are said to invite. *Decree affirmed.*[1]

[1] *Clarkson* v. *Clarkson*, 31 L. J. N. S. (P.) 143; *Giles* v. *Warren*, L. R. 2 P. & D. 401; *Goods of Thornton*, 14 P. D. 82; *Beardsley* v. *Lacey*, 78 L. T. N. S. 25; *Estate of Irvin*, 25 T. L. R. 41, *contra*. And see *Stamford* v. *White*, 84 L. T. N. S. 269.

As to ratification by the testator of an act of destruction not done by him, see *Cutler* v. *Cutler*, 130 N. C. 1; *Clingan* v. *Mitcheltree*, 31 Pa. 25; *Parsons* v. *Balson*, 129 Wis. 311; *Mills* v. *Millward*, 15 P. D. 20.

HOBBS *v.* KNIGHT.

1 Curt. Eccl. 768. 1838.

JOHN HOBBS[1] died March 7, 1838; after his death there was found among his papers a will dated January 19, 1835, with three codicils written on the same paper, the first without date, the other two dated February 25, 1837. From this will the signature of the deceased was cut out. There was also found a will dated February 17, 1838, which was invalid, because not attested as required by the Wills Act, 7 Wm. IV. & 1 Vict. *c.* 26 (1837).

An allegation, propounding the will of 1835 with the codicils, was brought in on behalf of one of the executors. It set forth that the will was in a perfect state until after January 1, 1838 (when the Wills Act came into operation), and that the testator knew that witnesses were necessary to give validity to the will of 1838. The widow opposed the admission of the allegation.

SIR HERBERT JENNER. The purport of the allegation, which now stands for admission before the court, is to show that the will executed by the deceased in January, 1835, remained entire and complete until after the commencement of this year (1838), when the Act of her present Majesty, entitled "An Act for the Amendment of the Laws with respect to Wills," came into operation; and the question is, Whether, under the circumstances stated in the allegation, this will is revoked? The admission of the allegation was opposed on two grounds: first, that the Act 1 Vict. *c.* 26, does not apply to this case at all; that the law applicable to the paper is that which existed before the 1st of January, 1838. Secondly, that if the Act does apply, the excision of the signature of the deceased is a sufficient revocation of the will with reference to the provisions of that Statute.

On the other hand, it has been argued that the allegation is admissible on these grounds, —

First, that the Act does apply;

Secondly, that the excision of the name is not a revocation under the Statute; and

Thirdly, that supposing a will may be revoked under the Statute by the excision of the name of the testator, still, that in this case, the deceased did not intend to revoke the will until a second will should have been duly executed, which not having been done, that the will before the court remains unrevoked.

[The learned judge then considered the first question, and determined that the Wills Act did apply. He then continued: — Ed.]

Assuming, then, that the Statute applies to the case before the court, the next question is, Does the cutting out of the signature of

[1] The following statement, which is taken from 4 Gray, Cas. on Prop. (2d ed.), p. 228, is substituted for that in the report.

the testator, the rest of the paper remaining entire, amount to a revocation of the will? In order to determine the effect of this act (the excision of the name of the testator) we must consider what is necessary to create a valid will under the Statute. The ninth section of the Statute is to this effect, "That no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." It appears, then, that the signature of the testator is necessary to the validity of a will; that no will is valid without it, so that it is not only a material part, but an essential part, without which a will cannot exist.

A will being so executed, the next question is, How is it to be revoked? The 20th section provides, "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid" (that is, by marriage, under the 18th section) "or by another will," &c., which does not apply to this case, "or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." Assuming then that this act was done by the deceased, it must be taken to have been deliberately done; the effect of that act is now to be considered. The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burned or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, that as the present Act of Parliament has pointed out certain modes with regard to the revocation of wills, the court cannot go beyond the express terms of the Act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms "obliterating" and "cancelling" used in the Statute of Frauds; there must be an actual burning or tearing, or as to "otherwise destroying," that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing — (burning is out of the question) — and the instrument not being destroyed, that there is no revocation; and upon this part of the argument, the case of *Doe dem. Reed* v. *Harris*, 6 Ad. & Ell. 209; 1 Nev. & P. 405, in the Queen's Bench, was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burned, but there being no burning on the instrument itself, the judges of that court

held that the will was not revoked; that the words of the Statute of Frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part, is removed, and if in that case the name of the testator had been burned or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burned or torn. The learned judges do not say how much it is necessary should be burned, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed; his expressions are these, "We were pressed with the argument: Must the whole of the document be destroyed? I say no; but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator." So I say here, Is not the entirety of the will destroyed by the removal of the signature of the testator? It is true this is not an act of tearing, in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to show that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb "to tear," is *lacerare*, but I find, upon looking into the dictionaries, that *exscindere*, "to cut out," is also used in the sense of "to tear," and Cicero uses the phrase *exscindere epistolam* (which is remarkable), with regard to the destruction of a document. But it is unnecessary to enter further into the consideration of this point, for, consistently with the true construction of the Act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is not necessary, in order to bring the act within the meaning of the words "otherwise destroying," that the material of the bill should be destroyed; it is sufficient, as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber; could there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife, that would be no revocation, and if the pieces could be collected and pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the Legislature to leave the law in that state. The question then comes to this: whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a

will, and that if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the Statute does certainly not deserve the title it bears, namely, "An Act to amend the Laws with respect to Wills."

It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration having been advisedly omitted by the Legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence *aliunde*, how would this operate with respect to the 21st clause of the Act, which enacts, "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration, shall not be apparent"? By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation *pro tanto*. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the Legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out: it never could be intended that a testator might revoke his will *pro tanto*, and yet not be at liberty to revoke the whole will.

Lushington. What does the court say as to the names of the two witnesses? By a parity of reasoning there would be a revocation by the obliteration of the names of the attesting witnesses.

SIR HERBERT JENNER. I think so too; and if any such case should occur, I should think that if the names of the attesting witnesses were erased by the testator *animo revocandi*, it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased *animo revocandi;* but if it could appear, I should be of opinion that it would amount to a destruction of the will, within the meaning of the Act of Parliament. I do not think that the words "*otherwise destroying*" mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself.

I am then of opinion that the 34th section of the Act of Parliament did not exempt the deceased in this case from the necessity of complying with the requisites of the Act, as to the manner in which this will was to be revoked; and secondly, that the act done to the will (the excision of the name) amounts to a destruction of the will within the meaning of the Statute.

With respect to the further point, whether the excision of the

name was intended only as a revocation, upon a new will being duly executed, I am of opinion that the case of *Onions* v. *Tyrer*, 1 P. Wms. 345, referred to in the argument, does not apply to the circumstances of this case, because in that case the deceased believed that the last will was a valid will, and on that supposition he proceeded to annul the former will; while in the present case, it is pleaded in the allegation that the deceased knew that two witnesses were necessary to the due execution of a will, and therefore that the paper before the court could not have any effect.

The court rejects the allegation.[1]

PRICE *v.* POWELL AND WIFE.

3 H. & N. 341. 1858.

POLLOCK, C. B.[2] This was an action of ejectment brought by the heir at law against the devisee under a will.

The cause was tried before Mr. JUSTICE CROWDER at the Summer Assizes for Brecon, when a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit or verdict for the defendant, on the ground that the act done by the testator in order to revoke his will was not sufficient within 1 Vict. *c.* 26, § 20. *Mr. Grove* accordingly obtained a rule for that purpose in Michaelmas Term. Cause was shown on the 10th and 11th of February at the sittings out of term. But as the court was not then full, and the question turns upon the meaning of the new Statute of Wills on the subject of a revocation, and the language of the 20th section of the 1 Vict. *c.* 26 differs from that of the 6th section of the Statute of Frauds, and is to receive a judicial construction as to this (we believe) for the first time; the court directed a second argument, which took place on Saturday last.

At the trial the jury found that it was the intention of the testator to revoke his will, and what he did was with that object. The will itself was on one sheet of paper, forming two leaves with four pages, and was executed in this form: "And in witness hereof I have to this my last will and testament, contained in four pages, set my hand and seal, that is to say, to the first three pages hereof I have

[1] And see *Goods of Morton*, 12 P. D. 141.

On crossing off and erasure of the testator's signature, see *Estate of Olmsted*, 122 Cal. 224; *Burton* v. *Wylde*, 261 Ill. 397; *Woodfill* v. *Patton*, 76 Ind. 575; *Gay* v. *Gay*, 60 Iowa 415; *Sellards* v. *Kirby*, 82 Kan. 291; *Townshend* v. *Howard*, 86 Me. 285; *In re Brookman*, 33 N. Y. Supp. 575; *In re Francis' Will*, 132 N. Y. Supp. 695; *In re Wellborn's Will*, 165 N. C. 636; *Goods of King*, 2 Rob. Eccl. 403; *Benson* v. *Benson*, L. R. 2 P. & D. 172; 51 L. R. A. N. S. 176 note; of the signatures of the witnesses, see *Abraham* v. *Joseph*, 5 Jur. N. S. 179; *Goods of James*, 7 Jur. N. S. 52; *Evans* v. *Dallow*, 31 L. J. (P. & M.) 128.

[2] The opinion only is given.

set my hand, and to the last page I have set my hand and seal: this, &c. CHARLES PRICE (L. S.)" And the attestation stated it to be "signed, *sealed*, published," &c. The testator in order to revoke it tore off the seal, tearing with the third leaf (on which in the fourth page the seal was placed) a similar portion of the first leaf on which were the letters "ral," being the final syllable of the word "funeral." The question is, whether this was a sufficient "tearing" within the meaning of the 20th section of the 1 Vict. *c.* 26, the words of which are — "by burning, tearing, or *otherwise destroying* the same" (*i. e.* the will). It was admitted that the word "destroying" did not import physical destruction; but Mr. Grove contended that the change of expression in the new Statute ("*cancelling and obliterating*" being left out, and "otherwise destroying" being introduced instead) imports that some act must be done so far destroying the will as to raise in itself a presumption (independent of other evidence) of an intention to revoke, and that merely tearing off the seal is not such an act, inasmuch as a seal is not at all essential to a will.

Very little assistance is to be derived from the previous cases in construing the altered expression in the Statute. There can be no doubt that prior to the new Statute a will found in the testator's possession with the seal torn off was deemed to have been cancelled: *Davies* v. *Davies*, 1 Lee Eccl. Rep. 444; *Lambell* v. *Lambell*, 3 Hagg. 568. At that time any tearing done with the intention of revoking had been held sufficient. The expression upon which we have now to put a construction is "by tearing or otherwise destroying"; and as it was admitted (and we think could not be denied) that actual destruction was not necessary, it becomes a question of degree, whether what was done in this case was sufficient; and in such cases, and indeed in all similar cases, we think it would be discreet not to lay down any general rule applicable to cases and circumstances which have not been the subject of argument before us, but to confine our judgment to the case at bar. And in our opinion as this will professed to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting witnesses, and through them to the world. It was, to use the expression of Mr. Justice Coleridge in *Doe d. Rees* v. *Harris*, 6 A. & E. 209, "destroyed in its entirety," and ceased to be (by means of tearing) the instrument as and for which it had been published. We are therefore of opinion that the act of tearing in this case was sufficient, and that the will was thereby revoked, and the rule to enter a nonsuit or verdict for the defendant must be discharged. *Rule discharged.*[1]

[1] See *Avery* v. *Pixley*, 4 Mass. 460; *Johnson* v. *Brailsford*, 2 Nott & McC. 272; *Will of Young*, 153 Wis. 337; *Clarke* v. *Scripps*, 2 Rob. Eccl. 563; *Williams* v. *Tyley*, Johns. 530; *Goods of Harris*, 3 Sw. & Tr. 485.

As to when a revocation by act to the document is total, and when partial, see *Estate of Wikman*, 148 Cal. 642; *Hartz* v. *Sobel*, 136 Ga. 565; *Benton* v. *Wylde*, 261

LARKINS AND OTHERS *v.* LARKINS AND OTHERS.

3 B. & P. 16. 1802.

THE following case was sent by the Master of the Rolls for the opinion of this court:[1]

William Larkins, by his will dated in 1794, gave all his land at Calcutta "unto my brother John Pascall Larkins, and to my good friend Samuel Enderby, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust," to sell the same, the proceeds to be taken "as part of the residue of my estate and effects, and go therewith as hereafter directed"; and he gave the residue of his estate and effects, real and personal, to the said Larkins, Enderby, and Smith, their heirs, executors, administrators, and assigns, upon certain trusts.

The testator had no other real estate than that at Calcutta.

After the testator had executed the will, he struck out, by drawing a pen through them, these words in the devise of the Calcutta land, viz.: "George Smith, of Lincoln's Inn, in the county of Middlesex." The name of George Smith was struck out from the residuary devise also. The testator never republished the will after making these alterations.

The question for the opinion of the court was, Whether the devise of the estate at Calcutta to the trustees named in the will was revoked by the testator's having struck out Smith's name?

LORD ALVANLEY, C. J. I have no doubt upon this case. A revocation by obliteration will have the same effect which a revocation by any other means will have, and no more. I lay out of the case the consideration of the devisees being trustees, for in a court of law they must be considered as joint tenants in fee absolutely. Now it is argued, that the revocation of the devise as to one devisee makes an alteration in the interest of the others. But whatever this alteration be, it is not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If therefore the devisees had been tenants in common, upon the erasure of one name the remaining two would take no more than two thirds of the estate.

Ill. 397; *Lovell* v. *Quitman*, 88 N. Y. 377; *Coghlin* v. *Coghlin*, 79 Ohio St. 71; *Menzies* v. *Pulbrook*, 1 Notes of Cas. 132; *Goods of Cooke*, 5 Notes of Cas. 390; *Williams* v. *Jones*, 7 Notes of Cas. 106; *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; *Goods of Woodward*, L. R. 2 P. & D. 206; *Goods of Maley*, 12 P. D. 134; *Treloar* v. *Lean*, 14 P. D. 49; *Goods of Leach*, 63 L. T. N. S. 111; *Leonard* v. *Leonard*, [1902] P. 243; 38 L. R. A. N. S. 798 note; 51 L. R. A. N. S. 169 note.

[1] The statement, which is abbreviated from that in the report, is taken from 4 Gray, Cas. on Prop. (2d. ed.), p. 218.

ROOKE, J. It is rather extraordinary that this point should now come to be decided for the first time; but though the point be new, I entertain no doubt that the erasure of the name of George Smith is to be considered as a revocation of the devise *pro tanto* only.

CHAMBRE, J. It would be most unreasonable to defeat the intention of a testator so plainly expressed as it is in the present case; and before we could come to such a decision I should expect authorities to be cited previous to the Statute of Frauds. For the revocations enumerated in the Statute were revocations at common law, and stand upon the same footing as if that Statute had never passed, it being declared that the restrictions introduced by that Statute should not extend to those revocations. The only argument of any weight which has been used is, that the remaining devisees take a larger interest. But that argument does not apply here; for the devisees, being joint tenants, are seised *per my et per tout;* and if one joint tenant die in the life of the testator, the other joint tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is, that the original devise is sufficient to pass the whole interest. The case of a tenant in common is indeed different, he being only seised of an undivided moiety. The effect of this act of obliteration, as it appears to me, is to take away that from G. Smith which the testator at first intended to give him. I cannot entertain a doubt upon the subject; and indeed the authorities cited are all one way.[1]

[1] In *Swinton* v. *Bailey*, 4 App. Cas. 70, the will of the testator left all his real estate to "Elizabeth Ely, her heirs and assigns forever." The will was found with that part of the devise after "Elizabeth Ely" struck through with a pen. The House of Lords held that this was a partial revocation of the devise reducing the provision to a life estate to Elizabeth under the 6th Section of the Statute of Frauds allowing the revocation of "any clause" of a devise. Lord Penzance said in part, p. 82:

"But, my Lords, another matter has been touched upon. It is not necessary for the determination of this case, because here the effect of what has been done has not been in any way to increase, but on the contrary, to decrease the interest that Elizabeth Ely took. But I confess that I have been wholly unable to appreciate the arguments which have been used elsewhere, and to some extent in this House, upon the question whether, supposing it to be established that this section of the Statute of Frauds really did give to the testator the power to revoke a portion of a devise, — that is to say, a portion of the words constituting a devise, — that power would cease to exist in a case where the effect of revoking a portion of the words used would be to increase, and not to diminish, the interest of the taker. If that construction is to be put upon the Statute, it ought, I think, to have some words from which that inference could be drawn. The Statute says, You may revoke a portion of those words constituting the devise if you like; but it says nothing about the effect. Of course it is easy enough to put hundreds of instances in which, as suggested by the Lord Chancellor, there having originally been the words 'without impeachment of waste,' a testator strikes his pen through them, and there is then an end of that disposition. Then another case may be put, perhaps rather in the opposite direction; where A. and B. are joint tenants or tenants in common. Whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial.

"My Lords, the opposite idea, I think, is founded upon a view of the word 'devise,'

BIGELOW AND ANOTHER, EXECUTORS *v.* GILLOTT AND OTHERS.

123 Mass. 102. 1877.

MORTON, J.[1] The presiding justice who heard this case has found as facts, that the testator erased the sixth and thirteenth clauses[2] of his will after its execution, and that such erasures were made with the intention of revoking the said clauses, but with no intention of revoking or defeating the other provisions of the will. These findings were clearly justified by the evidence. We need not consider the evidence in detail, as the appellants do not contend that the findings were erroneous, the only questions raised by them being as to the legal effect of such erasures.

The Statute provides that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil or writing, signed, attested and subscribed, in the manner provided for making a will." Gen. Sts. *c.* 92, § 11. This provision is a re-enactment of the Rev. Sts. *c.* 62, § 9, with merely unimportant verbal changes. The Rev. Sts. made material changes in the law as to wills, doing away with the distinctions between wills affecting real, and wills affecting personal, property, and putting all upon the same footing. The St. of 1783, *c.* 24, § 2, permitted the revocation of a devise of land, "or any clause thereof," in the manner pointed out in the Statute, which was the same manner now provided for the revocation of a will.

We see nothing to indicate that the Legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power

which is contrary to what I have suggested to your Lordships as the proper view. As I understand, the idea involved in that argument is this: A devise is a gift; if a testator has made a gift to a man the Statute gives him power to revoke the gift or any part of it, and not only to revoke a part of the gift, but to give something more. Looked at in that light one understands the idea; but I venture to think that the word 'devise' is not to be read in that way, but that a devise merely means a disposition of lands in words in writing, and that when you say that the testator may revoke 'any clause thereof,' that is, may revoke any portion of those words, it means any intelligible portion of those words, whether the effect is to increase the beneficial interest of the taker, or the reverse." But see *Eschbach* v. *Collins*, 61 Md. 478; *Pringle* v. *M'Pherson*, 2 Brev. 279.

Compare *Giddings* v. *Giddings*, 65 Conn. 149, 160; *Haven* v. *Foster*, 14 Pick. 534, 545–546; *Skipwith* v. *Cabell*, 19 Gratt. 758, 787; *Harris* v. *Davis*, 1 Coll. 416.

[1] The statement of facts is omitted.

[2] The sixth clause gave to the executors six thousand pounds in trust to pay debts of the testator's father. The thirteenth clause gave to S. on certain conditions a life estate in a farm.

to revoke a will includes the power to revoke any part of it.[1] If we were to hold that under this provision a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this Commonwealth, sanctioned by numerous decisions.

We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses.

The remaining question is as to the effect of this revocation upon the property affected by the revoked clauses. The appellants contend that the property devised and bequeathed therein is to be treated as intestate property, which goes to the heirs-at-law or distributees; and the executors and trustees contend that it passes to them under the residuary clause of the will.

It is a clearly settled rule of law that, in a will of personal property, a general residuary bequest carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this Commonwealth, since the passage of the Rev. Sts. in 1836, the same rule applies to wills of real estate. *Thayer* v. *Wellington*, 9 Allen, 283, and cases cited. It is true that if a special bequest in a will lapses or fails for any reason, the sum bequeathed will not pass to the residuary legatee if it appears from the will that it was the intention of the testator to exclude it from the residuary clause. In *Thayer* v. *Wellington*, *ubi supra*, the court say: "We take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. "I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed." The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he

[1] In some states the obliteration of part of a will is ineffective. *Law* v. *Law*, 83 Ala. 432; *Hartz* v. *Sobel*, 136 Ga. 565; *Lovell* v. *Quitman*, 88 N. Y. 377; *Coghlin* v. *Coghlin*, 79 Ohio St. 71; 25 Am. & Eng. Ann. Cas. 174 note; 38 L. R. A. N. S. 798 note.

intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property. *Decree of Probate Court affirmed.*[1]

MILES'S APPEAL.

68 Conn. 237. 1896.

APPEAL from an order and decree of the Court of Probate for the District of Milford, refusing to admit to probate a certain clause in the will of Diana M. Miles, taken to the Superior Court in New Haven County and tried to the court, HALL, J.; facts found and judgment rendered in favor of the appellants, and appeal by the original appellees for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

FENN, J. Diana M. Miles, late of Milford in this State, died in 1891, being then about eighty-six years of age. She left a will dated and executed February 13th, 1879. This will, in addition to the formal parts and the clause appointing an executor, contained two sections only, which are as follows: —

"*First.* After all my lawful debts are paid and discharged I give, devise, and bequeath to my nieces, Susan Whittlesey and Isabel Newton, daughters of my brother Charles, to each of them ten shares of the capital stock of The New York, New Haven & Hartford Railroad Company, being in all twenty shares of said capital stock, of the par value of one hundred dollars each, to them, their heirs and assigns forever.

"*Second.* I give, devise, and bequeath all the residue and remainder of my property and estate, both real and personal, of whatever kind and nature, to my brothers, Charles, David, and Henry Carrington Miles, share and share alike, to them, their heirs and assigns forever."

[1] *Collard* v. *Collard*, 67 Atl. (N. J.) 190; *In re Frothingham's Will*, 76 N. J. Eq. 331; *Brown* v. *Brown*, 91 S. C. 101, *accord.* And see *Home of the Aged* v. *Bantz*, 107 Md. 543.

When this will was presented in the Court of Probate lines appeared drawn through all that part of the above recited first section, after the words, "*First.* After all my lawful debts are paid and discharged I"; that is to say, commencing with the word "give," and ending with the word "forever." The words over which said lines were drawn were in no other manner canceled or obliterated, but remained perfectly legible.

The case came to the Superior Court on an appeal from an order and decree of the Court of Probate for the district of Milford, denying the application of the then appellants, that the words and clauses above referred to, through which lines were drawn, be admitted to probate, and in disapproving and disallowing said words and clauses, and in proving, approving, allowing and admitting to probate said will without said words and clauses. The Superior Court rendered judgment reversing the decree of the Court of Probate. From this judgment the original appellees appealed to this court. They thus in turn became appellants, and will be so regarded and styled in this opinion. The original appellants will be called the appellees.

Upon the trial in the Superior Court no exceptions to rulings upon evidence, or to anything which occurred during the presentation of the case, were taken. The court made a finding of the facts upon which its judgment was based, and the sole questions of law relate to the sufficiency of said finding to support and vindicate such judgment. The claims made by the appellants are stated in the finding, and were: that the facts found were sufficient in law to establish the fact that either the testatrix herself made said erasures, or caused the same to be made in her presence, and that upon said facts found, the erasures in question constituted a valid revocation of said bequests in said will; that the legal presumption was that said erasures were made by the testatrix, and that the burden of proof was upon the appellants to show that said erasures were not made by her, or by some person in her presence by her direction. The appellees claimed otherwise, and further, that a portion of a will could not in this manner be revoked under the statute of this State.

The Statute referred to, in force at the time the will in question was made, is now part of General Statutes, § 542. It provides: "No will or codicil shall be revoked in any other manner except by burning, canceling, tearing, or obliterating it by the testator or by some person in his presence by his direction or by a later will or codicil." There must of course in any given case be a will, otherwise valid and operative, before the question as to how it may be revoked will arise. There was one here, but lines had been drawn through a certain portion of it after execution, and before exhibition in the Court of Probate. The sole inquiry was, did this fact operate as a revocation, not indeed of the entire will, but of that portion of it. It could not so operate unless the requirements of the statute had been complied with. Waiving for the time the question whether

such cancellation, however effected, would constitute such partial revocation, it remains that in order to do it the act must be done by the testator, or by some person in his presence by his direction. Unless this be found, no finding that would justify a revocation exists. The court has made no such finding in this case. On the contrary the judge said: "I do not find that said erasures were made by the testatrix or in her presence."

But the appellants urge that the court did find certain evidential facts, and that upon these facts the legal presumption was that the cancellation was made by the testatrix *animo revocandi*, and that the burden of proving the contrary was upon the appellees. A word in explanation of this claim, as the appellants make it, may be called for. They do not assert that in every case, and at the outset, a burden rests upon the proponents of a will to prove not only the affirmative, that it was once valid, but also the negative, that it has not been afterwards revoked, either wholly or in part; to prove the case and anticipate and disprove the defense. This being so, they do not mean that a burden of proof is upon the appellants "in the first instance" — *Knox's Appeal*, 26 Conn. 20, 22 — but only a burden "shifted," if such expression is ever proper, and it is sometimes used. *Barber's Appeal*, 63 Conn. 393, 403. The main facts upon which the appellants rely in support of this claim of a legal presumption in their favor, are these: —

"The will in question was drawn by Charles Miles, the executor, in 1879, at the time it bears date, and remained in his posssesion unchanged until the fall of 1885, when David Miles, a brother of the testatrix, and one of the residuary legatees, sent for the will, and in pursuance of his request Charles Miles sent said will to said David. Shortly after the will was so sent by Charles Miles to David Miles, the testatrix handed to David Miles an envelope upon the outside of which was written, 'Diana Miles' will,' and said to him, 'There is my will.' As she handed the will to David he said to her, 'Are you satisfied with it now?' and she replied, 'Yes.' It did not further appear in evidence how or when or for what purpose, the testatrix had received said will from David Miles after he had received it from Charles Miles, as aforesaid. From that time the will remained in the possession of said David Miles, until his death in December, 1885. A few days after the death of David Miles, at the request of the testatrix, the will was delivered to Henry C. Miles, a brother of the testatrix, who from that time kept it in his possession until it was filed in the Court of Probate by said Henry C. Miles, in February, 1892. The erasures in question were made prior to delivery of the will to Henry C. Miles, after the death of David, aforesaid." They were not made prior to the time the will was sent by Charles Miles to David Miles, in 1885. "In the fall of 1881 said Henry C. Miles, who had procured a copy of said will, said to the testatrix, 'By your will you have given my brother Charles' family twenty-

four shares of the New York and New Haven Railroad stock, and you have given brother David and myself eight.' The testatrix replied, 'I won't have it so: I will scratch it out.'" The court reciting these facts added: "From the appearance of said erasures and from all the facts aforesaid, I believe that said erasures, though made at the request of the testatrix, and for the purpose of revoking the provision of the will over which said lines were drawn, were not made by the testatrix herself."

We discover nothing in these facts which raises what may be called a *legal* presumption in favor of the appellants, if by that term was meant anything more than that such facts, or some of them, have a recognized and declared probative weight, sufficient under some circumstances to establish a *prima facie* case. Concerning such presumptions, so called, there is in the books an infinite variety and contrariety of statement. But it is useless here to enter into a discussion of the matter, for upon the record before us we can see no reason to think the trial court failed to give to each item of evidence its full weight, whether naturally pertaining or arbitrarily attached to it by the law. It was the duty of the court to weigh all the evidence, and we cannot say that it did not do so, and correctly. In other words, if the appellants meant by their claim that facts found were sufficient as a matter of law to establish conclusively, irrefutably, the fact that the testatrix either herself made such erasures, or caused the same to be made in her presence, such claim is not correct, and no authority has been cited or exists anywhere to support such claim. But if it is only meant that such facts shift, satisfy or discharge a burden, casting it upon the other side, not to prove the contrary, but to disprove or overcome that, not to establish a negative, but to overcome an affirmative, we cannot say, nor do we believe, that the court below considered or acted otherwise than with the same view.

It was further claimed by the appellees, as we have seen, that a portion of a will could not be revoked in the manner considered. If this be correct, it in itself furnishes a full justification of the decision of the court below. For the reasons already stated, we do not need to place our decision upon this ground; yet we ought not to pass it by without some reference and consideration. It would perhaps be too strict a construction of the statute referred to, if we held that under no circumstances could there exist a partial revocation of a will or codicil, effected by burning, canceling, tearing or obliteration; that such revocation must extend to the whole instrument and be operative to revoke the whole, or be without effect. Such a construction has indeed been given to very similar statutory provisions in several other jurisdictions. But probably the weight of authority upon the question is otherwise. The entire subject is most exhaustively and ably treated in a note to the case of *Graham* v. *Birch*, 28 Amer. St. Rep. 344. But on the other hand

if we were to declare, following the language of the opinion often cited in *Bigelow* v. *Gillott*, 123 Mass. 102, that the authority to revoke an entire will included the lesser power to revoke any portion of it only, and to stop there, as the court in Massachusetts does, it seems to us that an inference might be drawn that would extend entirely too far. For, if such conclusion, looking at the statute in question alone, might be drawn, there is another statute appearing upon the same page of the General Statutes, namely § 538, providing how wills must be executed. If a case arises which is simply and purely one of revocation, § 538 will not apply. But if such revocation involves alteration, it certainly must apply. The difference in meaning between the two terms is aptly stated by Mellish, L. J., in *Swinton* v. *Bailey*, 45 L. J. Ex. 427, where a testator by his will had devised his real estate to *E*, "her heirs and assigns forever." He subsequently obliterated these words with pen and ink. The judge said (p. 429): "The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration." In *Eschbach* v. *Collins*, 61 Md. 478, is an able discussion of this matter. In that case the effect of erasures was to enlarge the estates of the devisees from life estates to fees. The court held such erasures inoperative under a statute which provided that a will, *or any clause thereof*, might be revoked by cancellation. The court said (p. 499): "The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word 'revocation,' it is to be construed to mean 'mutation.' . . . When by the obliteration of certain words a different meaning is imparted there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements." The court gives as an illustration of how fully such a transmutation might be made by mere erasures, this example: Suppose the original words were, "To my son William I give nothing, and give all my estate to my son John." The will with no addition could be made to read, "To my son William I give all my estate." This may seem an extreme illustration, but probably there are few wills made, of any considerable length, in which alterations in meaning, by mere erasure, could not be effected, as objectionable, if not as marked as this. Indeed, without holding that there are none, it seems to us that there are few cases that could arise where the revocation of a portion only of a will would not operate to alter other portions of it. If an entire clause — meaning by that word one of those distinct and generally numbered subdivisions into which wills are

frequently aparted, or an entire unconnected provision making disposition of property — be erased or canceled, and what was thus disposed of becomes intestate, it may be said that there is a revocation and nothing more.

The same thing has been affirmed by some courts where, instead of such intestacy, the property passes into a prescribed residuum. But this appears to us to be more questionable. The residuary devisee or legatee takes by virtue of the will, defeating the heir, and he takes by force of the alteration what he did not take without it. The mischief seems the same. The distinction is more apparent than the difference. Take the very case before us: There were originally two clauses. One disposed of certain stock; the other of the balance of the estate. By revoking the first, there ceased to be any residue, unless the estate in its entirety can be so styled. But look at the object of the change. Was it revocation, or was it alteration? One of the brothers of the testatrix procured a copy of the will from another brother who had it in his possession. He was apparently curious until he knew its contents, and dissatisfied when he learned them. He said to his sister, "By your will you have given my brother Charles' family twenty-four shares of the New York and New Haven Railroad stock, and you have given my brother David and myself eight." She said, "I won't have it so; I will scratch it out." What was this interested brother's motive? To defeat his nieces of their legacies? Or was it rather to increase his own? What would the old lady "not have so"? That her nieces should be remembered, or that the families of those brothers should be treated unequally? It seems to us the answer is obvious, and that to all just intents and purposes here was not merely revocation, but substitution; not destruction, but reconstruction; a "scratching out" indeed, but one equivalent to a writing in; the making of a new testamentary disposition, and in a manner not permitted by law — a law passed in the interest of public policy, the wisdom of which such a case as the present abundantly demonstrates.

There is no error.

In this opinion the other judges concurred.[1]

[1] On the presumption of the intent to revoke a will executed in duplicate by the destruction of one copy, see *Managle* v. *Parker*, 75 N. H. 139; *In re Schofield's Will*, 129 N. Y. Supp. 190; *Pemberton* v. *Pemberton*, 13 Ves. Jr. 290, 310; *Roberts* v. *Round*, 3 Hagg. Eccl. 548. Compare *Crossman* v. *Crossman*, 95 N. Y. 145; Utah, Comp. Laws (1907), § 2751; *Atkinson* v. *Morris*, [1897] P. 40.

On the presumption that a will not found has been destroyed by the testator, or that one found defaced has been defaced by him, see *Home of the Aged* v. *Bantz*, 107 Md. 543; *Williams* v. *Miles*, 68 Neb. 463; *Matter of Kennedy*, 167 N. Y. 163; *Matter of Hopkins*, 172 N. Y. 360; 1 Jarman, Wills (5th ed.), *p. 124.

On the question whether an alteration appearing on the face of a will is presumed to be made before or after execution of the instrument, see *Smith* v. *Runkle*, 97 Atl. (N. J.) 296; *Crossman* v. *Crossman*, 95 N. Y. 145; Page, Wills, §§ 431–433; 4 Wigmore, Evidence, § 2525; 1 Woerner, Am. Law Adm. (2d ed.), § 49.

BLACK *v.* JOBLING.

L. R. 1 P. & D. 685. 1869.

LORD PENZANCE.[1] In this case the deceased had executed several wills; but at the time of his death no valid will was found. In the hands of a legatee, however, was a document which purported to be a codicil, and is dated October 19th, 1867. It recites that the deceased had already bequeathed to his grandchildren the lease, stock, and profits, with everything relating to the farm of Fenham Hill, and gives in addition to each of them £300. The question is, whether this paper can be admitted to proof. It speaks of a bequest of a certain farm, which is contained not in any will of the deceased, but in a deed of gift executed by him on the 25th of May, 1867. The general proposition in relation to codicils is that a codicil stands or falls with the will to which it belongs. This general proposition is subject to certain exceptions, and my first consideration will be, What were the exceptions under the old law? The result of my inquiry into this matter is very unsatisfactory. The first case reported is that of *Barrow* v. *Barrow and Others*, 2 Phillim. t. Lee, 335. The deceased in that case had executed a will and codicil. By the codicil he gave the residue of his property to his wife. He then burned his will. The court said, "As to the codicil it was clear that by the law of England it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition." And yet, in that case, the codicil only disposed of the residue, and it was not possible to ascertain the extent of the term "residue" without the will. The next case was *Medlycott* v. *Assheton*, 2 Add. 229, in which the deceased executed a will and codicil. By the codicil she gave £100 each to two trustees named in her will, and divided some trinkets amongst her family. She afterwards ordered the will to be destroyed, which was done, but she preserved the codicil uncancelled, and it was found in her writing-desk. Sir G. Nicholl said, "A codicil is *prima facie* dependent on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of and unconnected with the will, that under the circumstances the codicil has been established though the will has been held invalid. It is a question altogether of intention, consequently the legal presumption in this case may be repelled merely by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, how-

[1] The opinion only is given.

ever, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption." In *Tagart and Bakewell* v. *Hooper*, 1 Curt. 289, the codicil was headed, "This is a codicil to my last will, and to be taken as a part thereof." Sir H. Jenner, in pronouncing for its validity, said, "In all the cases referred to, there were circumstances which showed that the codicils were dependent upon the wills; there is nothing here to show that the codicil was contingent upon the existence of the will." The court, therefore, in this case, suggests a presumption contrary to that raised in the other cases; for it decides that, to make the codicil invalid, there must be proof that it was intended to be dependent on the will. The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense any codicil that makes any disposition of property at all must be considered to be dependent on the will, which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the court in adopting it. But all these cases occurred before the Wills Act. Now the 20th section of that Act is more distinct and positive in its terms. "No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, . . . or by the burning, tearing, or otherwise destroying the same by the testator . . . with the intention of revoking the same." And I should have had no hesitation in holding that the intention of that section was to do away with all these implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first was *Clogstoun* v. *Walcott and Others*, 5 N. C. 623, in which the only observation bearing on this point, made by Sir H. J. Fust, was, "Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law, there must be an

intention to destroy." The other was the case of *Grimwood* v. *Cozens and Others*, 2 Sw. & Tr. 364, in which Sir C. Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the Statute. The question then is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for the probate of the codicil alone, that it was intended that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." Now, in reviewing these decisions, I cannot perceive that the effect of the Statute has been fully considered by the court. Sir C. Cresswell seems to have thought that it had been decided that the Statute made no difference, and passed it by as having been so decided; and Sir. H. J. Fust dismissed the point without any reasoning whatever, merely affirming that the Statute had made it necessary that there should be an affirmative intention to revoke. But the Statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the Statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the Statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to be admitted to proof.[1]

C. *Dependent Relative Revocation.*

GOODS OF APPLEBEE.

1 Hagg. Eccl. 143. 1828.

WILLIAM APPLEBEE died on the 7th of November, 1827, leaving behind him Mary Ann Arnald, widow, his natural and lawful sister, and only next of kin; and Sarah (wife of Charles Bassage), his

[1] *Goods of Savage*, L. R. 2 P. & D. 78; *Goods of Turner*, L. R. 2 P. & D. 403; *Gardiner* v. *Courthope*, 12 P. D. 14; *Paige* v. *Brooks*, 75 L. T. N. S. 455, *accord*. *Youse* v. *Forman*, 5 Bush 337; North Dakota, Comp. Laws (1913), § 5673; Oklahoma, Rev. Laws (1910), § 8370; South Dakota, Comp. Laws (1913), § 1029; *Sugden* v. *St. Leonards*, 1 P. D. 154, 206, *contra*. See *In re Nokes' Estate*, 130 N. Y. Supp. 187; *In re Francis' Will*, 132 N. Y. Supp. 695; *Smith's Estate*, 2 Pa. Co. Ct. R. 626; *Goods of Bleckley*, 8 P. D. 169; *Coyte* v. *Coyte*, 56 L. T. N. S. 510.

As to the effect on a will of the revocation of a codicil, see *Burton* v. *Wylde*, 261 Ill. 397; *Osborn* v. *Rochester Trust Co.*, 209 N. Y. 54; 46 L. R. A. N. S. 983 note.

lawful niece — the only persons entitled in distribution in case he had died intestate. The deceased duly executed his will on the 14th of April, 1823. In 1825, he delivered this will (the exhibit A) to Mr. Jackson, the sole executor, and requested him to make certain alterations in it. Mr. Jackson drew his pencil through the signature at the bottom of the will, and made some alterations with the same material: the deceased expressed his approbation of them, and said, that he would make a copy, and execute the same in the presence of witnesses.

On the 29th of September, 1827, the deceased mentioned to his solicitor, that he had made his will in his own handwriting, and promised to show it to him; and on the first of November, he told an intimate friend — whose opinion he had asked respecting the papers marked B — that he would write his will again; and, on the evening of the same day, the deceased mentioned to his sister that he proposed to recopy his will. On the 6th, the deceased brought the papers (B) from his bedroom into the parlor, and said to his sister, "That he had intended to reduce them to a smaller compass, but found himself too weak to do so; and added, that if he did not get better, he would have his will written for him on the morrow." On the following day, the deceased died: "B" was found in a closet of his bedroom; and "A" was found (with the signature of the deceased, and the names of the witnesses struck through), in a box with leases, and documents of importance.

These circumstances were fully substantiated by affidavit, and Mrs. Arnald and Mrs. Bassage and her husband had executed a proxy, consenting "to probate of the said will of the deceased, bearing date the 14th of April, 1823, or letters of administration with the said will, or the said testamentary memoranda annexed, of all and singular the goods, chattels, and credits of the deceased, being granted in such manner and form, and to such person, as the court may direct."

PER CURIAM. The paper B is, in substance, the same as the will of 1823, marked with the letter A; but it also contains a great deal of matter extraneous, and not of testamentary import. There can be no advantage in annexing it to the will. The signature of "A," being struck through, is to be regarded as preparatory to the deceased making a new will — which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation. The court, therefore, as the consent of all parties interested has been given, thinks it would best consult the intentions of the deceased, by decreeing probate of "A" singly, as it originally stood before the signature was touched. *Motion granted.*[1]

[1] But see *Dixon* v. *Solicitor to the Treasury*, [1905] P. 42. Compare *Bethel* v. *Moore*, 2 Dev. & B. 311.

SEMMES *v.* SEMMES ET AL.

7 H. & J. (Md.) 388. 1826.

APPEAL from a decree of the Orphans Court of Charles County, refusing to admit to probate and record a paper offered as the last will and testament of Ignatius Semmes, deceased.

The cause (which is sufficiently explained in the opinion delivered by this court) was argued before BUCHANAN, C. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

BUCHANAN, C. J., delivered the opinion of the court. It is objected, on the part of the appellant, that the Orphans Court did wrong in not admitting to probate a paper, purporting to have been a duly executed will of Ignatius Semmes, on two grounds: First: Because the obliterating the name of Ignatius Semmes, and also the names of the three subscribing witnesses, does not appear to have been done by the deceased; and secondly: That if it was, it did not amount to a revocation of the will.

With respect to the first proposition, it does not appear to admit of a doubt, that each obliteration was made by the deceased Ignatius Semmes.

The *memorandum* at the foot of the paper, and just below the signatures, in these words — "In consequence of the death of my wife, it is become necessary to make another will," and signed Ignatius Semmes, is admitted to be in his handwriting. The obliterations were made by drawing a pen frequently, and in different directions, across his own signature, and the names of the subscribing witnesses; and the ink with which it was done, is proved to have been the same with which the memorandum at the foot of that paper was written. Hence it is manifest, that the obliterations, and the memorandum, were simultaneous acts, and by the deceased himself; and it would be straining overmuch to admit the supposition, that it might have been surreptitiously done by another, in the absence of any testimony to cast the slightest shade of suspicion upon anybody. The memorandum must be considered as connected with the obliterations as a part of the *res gesta*, and as explanatory of the transaction. It is equivalent to a declaration, that he had made the obliterations, for the reason assigned (the death of his wife), which made it necessary to make another will.

Considering then the obliterations to have been made by the deceased, the second objection presents itself, to wit, that the will was not thereby revoked; in support of which several authorities were cited and relied on in argument, but none of them sustain the proposition, and it would be somewhat strange if they did.

In *Onions* v. *Tyrer*, 1 P. Williams, 343, the deceased, by a will duly executed to pass real estate, devised lands to trustees, to certain uses, and afterwards made another will devising the same lands to

other trustees, but to the same uses, with a clause of revocation of the first, and attested by three witnesses, who did not sign their names in the presence of the testator. Supposing the second will to be duly executed to pass real estate, the testator caused the first to be cancelled. But it was determined, that the witnesses to the second, not having signed their names in the presence of the testator, it was void as to the land, and could not therefore have the effect to revoke the former; and the cancelling of the first will, under the presumption that the second was good and effectual, was held not to amount to a revocation of it, on the ground that it was done by mistake. The case of *Hyde* v. *Hyde*, 8 Vin. Ab. 142, was clearly a case of mistake. And the case of *Mason* v. *Limbrey*, cited by Lord Mansfield, in 4 Burr. 2515, was decided on principles not at all applicable to this case.

The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi*. And where it is a dependent relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation. But never where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will.

It is said, and indeed it would seem from the testimony, that Ignatius Semmes did not intend to die intestate, but however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole of his estate to his wife, in trust for the "use and support of herself, and the benefit, education and support," of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one half of his personal property absolutely to his wife; but she dying, he struck out his own signature, and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done, that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by cancelling. In *Burtenshaw* v. *Gilbert*, 1 Cowp. 49, which was cited in argument, there were two wills, and after the death of the party, the second will, with a duplicate of the first, which he had kept himself, were found together among his papers both cancelled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will

was revoked. The only question raised, was whether the revocation of the second will did not set up the uncancelled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will. *Decree affirmed.*[1]

[1] *Estate of Olmsted*, 122 Cal. 224; *Banks* v. *Banks*, 65 Mo. 432; *In re Frothingham's Will*, 76 N. J. Eq. 331, *accord*. See *Safe Deposit Co.* v. *Thom*, 117 Md. 154, 166–169; *Johnson* v. *Brailsford*, 2 Nott & McC. 272.

In *McIntyre* v. *McIntyre*, 120 Ga. 67, Simmons, C. J., said, p. 71: "Reference is made in the brief of counsel for the defendant in error to what is known as the doctrine of 'dependent relative revocation.' Under the operation of this doctrine it has been held that if a testator cancel or destroy a will, with a present intention to make a new will as a substitute for the old, and the new will is not made, or if made fails of effect for some reason, it will be presumed that the testator preferred the old will to an intestacy, and this testament will be given effect. We believe this doctrine to be sound, when properly understood and properly qualified. It is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Some of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive. The doctrine, as we understand it and are willing to apply it, is this: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked, — if the act of revocation is completed, — as if the will be totally destroyed by burning and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which can not take effect, counts for nothing. In other words, evidence that the testator intended to make or did actually make a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked. See, on the subject, Page on Wills, § 276; Schoul. Wills (3d ed.) § 398; Pritch. Wills, § 272; 1 Woer. Am. Law Adm. (2d ed.) § 48, *90–91; *Semmes* v. *Semmes*, 7 Har. & J. (Md.) 388; *Banks* v. *Banks*, 65 Mo. 432; *Hairston* v. *Hairston*, 30 Miss. 276; *Wilbourn* v. *Shell*, 59 Miss. 205, 42 Am. R. 363; *Gardner* v. *Gardner* (N. H.), 8 L. R. A. 383; *Will of Penniman* (Minn.), 18 Am. R. 375; *Johnson* v. *Brailsford* (S. C.), 2 Nott & M. 272; *In re Olmsted's Est.* (Cal.), 54 P. 745, 747; *Thomas* v. *Thomas* (Minn.), 79 N. W. 104; *Townshend* v. *Howard* (Me.), 29 A. 1077; notes to *Graham* v. *Burch*, 28 Am. St. Rep. 345. Applying what has been said to the facts of the present case, the following result is reached: There was evidence from which the jury could have found that when the testator canceled the old will he intended to make a new one. The canceled paper itself bore evidence of such an intention. If this was his intention, and he did not intend for the cancellation to operate as a revocation unless the new will was made, then the finding ought to be in favor of the propounder. On the other hand, there was evidence from which a jury could find that the cancellation was intended to operate as a revocation; and if this is the truth, the finding ought to be against the will, notwithstanding it may appear that the testator contemplated the making of another will. These are questions for the jury to decide. The matter finally turns upon the intention of the testator, and no mere presumption can be allowed to defeat this intention when it has been made to appear."

ONIONS *v.* TYRER.

2 Vern. 742. 1717.

Mr. Tyrer, in 1707, made a will, duly attested by *three* subscribing witnesses, and thereby had disposed of his real estate, and being afterwards minded to make some alteration in his will, in the year 1711 he made a second will touching his real estate, and with a clause in it of revoking all former wills; but there being no table in the room where the testator lay sick and subscribed his will, the *three* subscribing witnesses did not attest it in his presence, but went into a lower room out of the testator's sight, and there wrote their names as witnesses to the publishing this latter will; and it was also in proof in the cause that there being two parts of his former will, one whereof was in his custody, he called for that which was in his own custody, and directed his wife to cancel it, and the witness swore she heard her tear it; and the question now was, whether the former will was well revoked, or not.

First. It was resolved, that although there was an express clause in the latter will of revoking all former wills; yet *that* latter will being void, the witnesses not attesting the same in the testator's presence, *that* would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation: and so it was adjudged in the case of *Eggleston and Speak*, 3 Mod. 258; Sir Bart. Shore's Reports, 89; and in the case of *Hilton and King*, 3 Lev. 86.[1]

Secondly, where there were duplicates, and two parts of the former will, in case the testator duly cancelled and tore *that* part, which was in his own custody or keeping, that would be an effectual cancelling of the will, although the other part or duplicate remained whole and uncancelled; and it was so resolved in *Sir Edward Seymour's Case.*

Thirdly. Lord Chancellor [Lord Cowper] was of opinion, that the former will stood good; for the latter will being void, and not operating as a will, would not amount to a revocation; and as to the actual cancelling of the former will, the evidence was not full and positive, that it was done; the witness thought she heard the wife tear it. It is plain he did it only upon a supposition that he had made a latter will at the same time, and both wills as to the main, were much to the same effect, and with little variation as to the disposition of the real estate; and he did not cancel it with a design to revoke the devises as to the real estate, but intended to do the same thing by a latter will; and in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident, and decreed it accordingly.

[1] See *Barksdale* v. *Barksdale*, 12 Leigh 535.

POWELL *v.* POWELL — POWELL INTERVENING.

L. R. 1 P. & D. 209. 1866.

WALTER POWELL, late of No. 30, Park Walk, Chelsea, the deceased in this case, died on the 18th of June, 1865. He executed a will on the 3rd of March, 1862, by which he left all his property to his grandson, Edward Burfoot Powell, the plaintiff, whom he appointed his executor, and another will on the 29th of March, 1864, by which he revoked all former wills, and bequeathed all his property, to his nephew Walter Powell, whom he appointed his executor. This latter will he destroyed in the early part of the year 1865, and under the circumstances connected with its destruction there arose a question on the doctrine of dependent relative revocations.

The plaintiff propounded the will of March 3, 1862. The defendant, who appeared to establish an intestacy as a granddaughter and one of the next of kin of the deceased, pleaded first, a traverse of due execution of will propounded; secondly, that subsequently to its execution, the deceased made and duly executed, according to 1 Vict. *c.* 26, a will dated the 29th of March, 1864, at a time when he was of sound mind, memory, and understanding, by which the will of March 3, 1862, was duly revoked. Issue joined.

Evidence was given of the due execution of the first will. Evidence was also given of the due execution of the second will, and upon proof of its destruction by the testator, the draft was received as evidence of its contents. Mrs. Elizabeth Willis, who was present at its destruction, deposed, that early in 1865, the testator, whose housekeeper she was, seemed disturbed in his mind, and on her inquiring the cause, he said he was not easy in his mind about the last will he had made, leaving his property to his nephew, Mr. Walter Powell; that one day he got out two or three wills, and asked her to read them to him, and as she could not read very well, he called in the charwoman, who read the wills of 1862 and 1864 to him; that he then placed the will of 1862 under his arm, and said that was the will he intended to stand, and he tore the will of 1864, which was, by his request, put into the fire and burnt in his presence.

By arrangement between the parties, Mr. Walter Powell intervened and propounded the will of 1864.

SIR J. P. WILDE. The testator in this case made a will on the 3rd of March, 1862, and a second will, revoking the first, on the 29th of March, 1864. In 1865 he destroyed the will of 1864, and the question is, whether, by that act of destruction, the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862. It is not contended that effect could be given by law to this object, but failing that, it is argued that effect

ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it"; or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" In either case, the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present. It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration. The only case cited that requires special mention is that of *Dickinson* v. *Swatman*. [30 L. J. (P. M. & A.) 84.] But Sir C. Cresswell, in that case, does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said, "At all events, to make it a case of dependent relative revocation, you would have to shew that he did not intend to revoke the second will unless by doing so the first would have been revived."

The Court pronounces, therefore, for the will of the 29th of March, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it.

The cost of all parties out of estate.[1]

STRONG'S APPEAL.

79 Conn. 123. 1906.

BALDWIN, J. Jonathan N. Harris died in 1897, leaving by will his residuary estate in trust for twenty-one years and the life of his wife; a certain share of the annual income to be meanwhile annually paid to a niece of his wife, Miss Elizabeth M. Strong, during her life. At the end of that period, she was, if then living, to have a corresponding share of the principal. She was also given power to dispose by will of both the income and principal of such share, should she die before the trust was terminated. A few months later, in the same year, Miss Strong made a will bequeathing a silver tea-set to an uncle, and exercising the power conferred by Mr. Harris in such a way as to give the income of her share of the trust fund to her father for life, remainder to her mother for life, remainder to her sister, the appellant, for life, remainder in fee to her brother.

Subsequently — her father and mother having died and the financial condition of the appellant having improved — Miss Strong expressed the intention of changing her will so as to exercise the power in favor of her brother, alone. After this, in 1905, she fell sick, and died after a three days' illness, during most of which she was delirious. The will of 1897 (which was typewritten) was found in an envelope in her bureau drawer, each page torn in two lengthwise, but the cover untorn. She had written at the top of the first page, "Superseded by written one." In the same envelope was an unsigned draft of a will in her handwriting. This contained the same bequest of the tea-set; provided for the disposition of some other family silver; and ended thus: "The income left to me by the will of Jonathan N. Harris of New London at my death I desire should go to my brother Edward L. Strong the said Edward L. Strong to have said income during his life or in case the trust be terminated, said portion of the principal to be paid to him his heirs & assigns forever."

Neither the typewritten will, nor the written draft, contained any residuary provisions, nor did the latter bear any date or have any subscription clause. Miss Strong's heirs at law were the appellant, her brother, and another sister. Her relations to the appellant were most affectionate. The will was torn a short time previous to her death, but whether during or before her last illness could not be ascertained.

[1] See *Cossey* v. *Cossey*, 82 L. T. N. S. 203.

The income and principal of her share (the amount of which was over $15,000) in the trust fund, in default of her exercise of her power, was, by the will of Mr. Harris, to go to certain of his nephews and nieces and their representatives.

The paper presented to the Court of Probate as the will of Miss Strong was in a condition which had some tendency to show that she had revoked it. It had been torn and it had been marked by her as "superseded by written one." It has not been found by the Superior Court that she tore it, but we shall treat the case as if such a finding had been made, and as if whatever she did was done before she became delirious in her last illness.

No act of tearing or cancellation destroys a will unless it be done with the intention of revoking it. An intent to revoke may be either absolute and final, or dependent on the existence, or a belief in the existence, of certain circumstances.

The words "superseded by written one" sufficiently indicate that when Miss Strong wrote them she assumed that the draft in her handwriting then had full testamentary force and effect, and so, as it covered the same ground in a different manner, had destroyed her previous dispositions by will. These were treated as destroyed simply because they had been replaced by something else. Here she was acting under a mistake, and one apparent from the words used to effect the cancellation. This mistake was plainly the sole cause for the revocation which she intended to declare. Unless she exercised the power of disposition given her by Mr. Harris, the fund which was subject to it would go to strangers to her blood. The main object both of the will and of the draft-will was to exercise it.

The case, therefore, is within the reason of the rule that a writing purporting to revoke a will on account of the existence of a certain fact does not revoke it if there be no such fact. *Dunham* v. *Averill*, 45 Conn. 61, 80.

It is true that the mistake is, at bottom, one of law. Miss Strong supposed that her unsigned and unattested will would have full effect upon her decease. In law it had no effect. But as respects a question of this nature, it is immaterial whether the mistake under which the act of revocation was done were one of fact or law. The act was nothing unless done with the intent of revocation. If the intent to revoke was, as in this case, clearly dependent on a reliance upon a certain legal consequence attributed to certain circumstances, an error in attributing that effect to them is as effectual a bar to an actual revocation as if it were a pure error of fact. *Security Co.* v. *Snow*, 70 Conn. 288, 294, 39 Atl. 153; *Stickney* v. *Hammond*, 138 Mass. 116, 120; *Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497.

The expression of the motive for the act of cancellation must govern the result of the act of tearing the will. The will and draft-will having been found in the same envelope, it is evident that

whatever Miss Strong did constituted one transaction proceeding from the same intent and actuated by the same clause.

It is found by the Superior Court that the will signed in 1897 was executed in all respects according to law, and that Miss Strong was then of full age and sound mind and memory. It should therefore have been admitted to probate.

The Superior Court is advised to disaffirm the decree of the Court of Probate, and admit the paper propounded as the will of Miss Strong to probate, as such.

No costs will be taxed in this court.

In this opinion the other judges concurred.[1]

LOCKE AND OTHERS *v.* JAMES.

11 M. & W. 901. 1843.

PARKE, B.[2] The material facts in this case were as follows.

Ralph Nicholson, by his will, duly signed and published in the presence of and attested by three witnesses, devised certain real estates in Essex to his son Ralph Nicholson in fee, charged with the payment of an annuity of six hundred pounds to his daughter Elizabeth James, the defendant, for her life, with the usual powers of distress and entry; and after various other devises and bequests, he gave all the residue of his estate, after payment of his debts, and the legacies and annuities thereinbefore bequeathed, and the duty payable thereon, to his said son, his heirs, executors, and administrators. On the 15th of August, 1830, the testator with his pen erased the word "six," in the gift of the annuity, and wrote over it the word "two," leaving, however, the word "six" still legible; and on the same day, he signed a codicil in the presence of and attested by one witness only, mentioning that he had on that day made the above-mentioned alteration.

The testator died in December, 1831, and his will and codicil, with other codicils not material to be now considered, were duly proved soon after his decease, and the executors possessed themselves of his personal estate, which was more than sufficient to satisfy his debts and legacies, including the annuities.

The plaintiffs are the parties entitled to the real estate under Ralph Nicholson, the devisee, and they have brought the present action, which is an action of trespass for seizing their goods under a distress. The question is, whether the defendant is entitled under the will and codicil to an annuity of £600 *per annum*, or to an annuity of £200 *per annum* only. If she is entitled to £600 *per annum*,

[1] See *Wilbourn* v. *Shell*, 59 Miss. 205; *Winsor* v. *Pratt*, 2 B. & B. 650; *Scott* v. *Scott*, 1 Sw. & Tr. 258; *Dancer* v. *Crabb*, L. R. 3 P. & D. 98.

[2] Only the opinion is given.

then it is admitted that the distress was lawful, and that this action cannot be maintained.

It was not, and indeed could not have been, disputed, but that if the annuity had been charged on the real estate only, then neither the erasure nor the codicil would have affected it. The erasure would have had no effect, because the testator did not mean to destroy the annuity of £600 *per annum* in any other way than by substituting for it an annuity of £200 *per annum*. The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. The codicil or memorandum, being unattested, clearly could have no effect on the disposition of the real estate.

But on the part of the plaintiffs, it is argued, that, taking such to be the law where the gift relates to real estate only, yet here the case is different, for that, looking to the whole will, the personal estate would be the primary fund for payment of the annuity, the real estate being liable only in case the personal estate should be deficient. And then it was said, the erasure and codicil together would certainly have the effect of reducing the annuity, so far as it was payable out of the personal estate, and so, by necessary consequence, must affect the real estate, which is merely charged by way of security, in case the personal estate should be insufficient. And in support of this proposition the plaintiffs relied mainly on the case of *Brudenell* v. *Boughton* [2 Atk. 268], before Lord Hardwicke. The defendant's counsel, on the other hand, contended that, even supposing *Brudenell* v. *Boughton* to have been well decided, yet it did not apply to a case like the present, but only to the case of a general charge of legacies; and he referred to *The Attorney-General* v. *Ward* [3 Ves. Jr. 327], *Kirke* v. *Kirke* [4 Russ. 435], *Beckett* v. *Harden* [4 M. & S. 1], and other cases.

We do not think that, in order to decide this case, we are bound to discuss, or indeed that we should be warranted in discussing, the question as to what effect a court of equity might give to the acts of this testator. The question for our decision is a mere legal question. The testator by his will gave to the defendant a legal interest in his lands (for an annuity charged on land, with a power of distress, is clearly a legal interest), and what we have to decide is, whether that legal interest has since been altered. We are clearly of opinion that it has not. It is clear, that if the annuitant had

nothing but the land to resort to, her interest would have remained unaltered, for the reasons already mentioned, and the circumstance that she may, through the medium of a court of equity, have another fund liable to her demand, cannot possibly affect our judgment. A court of law cannot look to anything but the legal rights of the parties; if, by means of the erasure and codicil, that which was originally a right to or a security for £600 *per annum*, has now become a security for £200 *per annum* only, the parties injured by the attempt to enforce the larger demand must have recourse to a court of equity for relief. The legal interest remains as it was originally.

That legal interest is a rent-charge of £600 *per annum*, created by a will duly executed and attested. The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi*. It has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned. On this short ground there must be

Judgment for the defendant.[1]

GOODS OF HORSFORD.

L. R. 3 P. & D. 211.

GEORGE FAHIE HORSFORD, late a captain in Her Majesty's service, unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where the witnesses signed their names. At the top of the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868. — GEO. F. HORSFORD, Captain unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics: "I leave the interest on £309 9*s.* 6*d.* bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C. B., for his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th Regiment, and after her death the principal of the said bank stock *to Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of £174 2*s.* 3*d.* reduced

[1] *Will of Penniman*, 20 Minn. 245; *Kirke* v. *Kirke*, 4 Russ. 435; *Brooke* v. *Kent*, 3 Moore P. C. 334; *Soar* v. *Dolman*, 3 Curt. Eccl. 121; *Goods of Nelson*, 6 Ir. Eq. 569, *accord*. And see *Gardner* v. *Gardner*, 65 N. H. 230.

3 per cent annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C. B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal *to Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*" Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner. It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne. The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford. Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my bank stock, for her sole use. I leave and bequeath *ten* pounds, *which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut.-Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. The witnesses, Captain Hedley and Mrs. Bourne, who attested both documents, in their affidavit, stated that at the execution of the will they had no opportunity of observing the earlier pages of it, and did not notice whether the strips of paper now pasted thereon were there at the time of attestation. That, as regards the codicil, they subscribed their names in the presence of the deceased and of each other, having been requested by testator to attest his signature thereto. That they did not see the will at the time of the execution of the codicil. That the codicil is now in the same plight and condition as it was at the time of attestation, save that they did not see the first page of the said codicil, and they are unable to say what was written on that page nor whether the pieces of paper were pasted on, or if anything was written thereon. That the writing on the second page of the codicil was then about the same as now.

The court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in court. On the 1st of December they were examined. Captain

Hedley stated that he knew Captain Horsford, who had asked him on two occasions to witness papers. That in the summer of this year he was present in deceased's room. Mrs. Bourne, the landlady, was also there. He, Mrs. Bourne, and Captain Horsford, were only present. Deponent asked no questions. He could not say whether he saw deceased's signature. Deceased asked him to witness a paper. He did not recollect whether there was a name on the paper. It was a sitting-room. Deceased was standing. There were pens and ink on the table. He could not recollect anything else. The deceased asked him to sign, which he did. He believed the paper was then attached as now. He did not notice the deceased's name, or whether the paper was signed. He was not accustomed to business. Mrs. Bourne deposed that Captain Horsford lodged in her house. He had asked her to witness papers twice. In the summer, about July last, he asked her to come into his room with Captain Hedley to sign a paper. She did not see him sign it. It was signed before she entered the room. Captain Hedley was in the room before she was. She saw Captain Hedley sign. Captain Horsford produced the paper. To the best of her recollection all the writing as it now appears on the paper was there when she signed.

Cur. adv. vult.

Dec. 2. SIR J. HANNEN. The testator, George Fahie Horsford, deceased, made his will, bearing date the 1st day of April, 1868. It covers four pages of a sheet of foolscap, and continues on the fifth page, being the first of a second sheet. At the bottom of the fifth page is a formal attestation clause, and the signature of the witnesses are added below the clause. The signature of the testator appears at the top of the sixth page, preceded by these words: "To which will and testament I hereunto annex my seal and signature, dated this 1st April, in the year of our Lord 1848." The attesting witnesses state that, to the best of their recollection, the testator showed and acknowledged to them his signature, signed on the will on the upper part of the sixth page of the said paper, and that then they signed the attestation thereof. I think that the execution of the will by the testator is valid, notwithstanding the position of the signature, by virtue of the Statute 15 Vict. *c.* 24. There is also a codicil, dated the 29th of July, 1874, in which the signature and attestation of the witnesses are on a separate sheet, attached by a string to the codicil. The evidence of the attesting witnesses is not very clear as to what occurred at the time of execution, but I have come to the conclusion that the sheet was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before the attestation. A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will

and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will or codicil with the hidden passages in blank, or ought I to endeavor to ascertain what words have been covered up, and include them in the probate? As to the will, the answer to these questions depends upon the construction to be put on the twenty-first section of the Statute 1 Vict. c. 26, by which it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the Act, Sir H. J. Fust, in *Townley* v. *Watson*, 3 Curt. 761, decided that the construction to be put upon the words of the twenty-first section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent'?" I think it is impossible to read the words of the Statute, and not say that it was the intention of the Legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament. Mr. Justice Williams (Executors, page 139, 6th ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking, the Ecclesiastical Court will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical

agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means. I think that the word "apparent" in the twenty-first section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this court is not bound to take any steps to undo what he had done. The Statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection, the probate must go with those parts in blank. But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found with* (to which the same remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.[1]

IN RE KNAPEN'S WILL.

75 Vt. 146. 1903.

APPEAL from a decree of the Probate Court establishing an instrument as the will of Sabina Knapen. Heard on an agreed statement of facts, at the March Term, 1902, Rutland County, WATSON, J., presiding. Judgment disallowing the will. The proponent excepted.

[1] At a later litigation over the will it was found possible to decipher the words of the original will without removing the pasted paper. *Ffinch* v. *Combe*, [1894] P. 191.

See *Wolf* v. *Bollinger*, 62 Ill. 368; *Thomas* v. *Thomas*, 76 Minn. 237; *Varnon* v. *Varnon*, 67 Mo. App. 534; *Smith* v. *Runkle*, 97 Atl. (N. J.) 296; *Jackson* v. *Holloway*, 7 Johns. 394; *Pringle* v. *M'Pherson*, 2 Brev. 279; *Stover* v. *Kendall*, 1 Cold. 557; *Simmons* v. *Rudall*, 1 Sim. N. S. 115; *Goods of McCabe*, L. R. 3 P. & D. 94; *Goods of Greenwood*, [1892] P. 7.

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is threefold, — whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix' two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased"; and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was type-written, and all the attempted changes made with a pen are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each, the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb"; and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over the word "two," and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or ob-

literating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation? The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from *Warner* v. *Warner's Est.*, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I. Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. *Wheeler* v. *Bent*, 7 Pick. 61; *Jackson* v. *Holloway*, 7 Johns. 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. *Bigelow* v. *Gillott*, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. *Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176. But if we should hold otherwise upon this point, as was done in *Bigelow* v. *Gillott*, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests, and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive

the benefit arising therefrom. In short, the alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." *In re Brewster*, 6 Jur. (N. S.) 56, 29 L. J. P. and D. 69; Woerner's Am. Law of Administration, sec. 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause *dehors* the instrument. *Hairston* v. *Hairston*, 30 Miss. 276.

Jarman on Wills, vol. I, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, sec. 49; Jarman on Wills, vol. I, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix' handwriting, does not say with what intention they were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

CAMPBELL *v.* FRENCH.

3 Ves. Jr. 321. 1797.

The will of the testator, dated London, 23d of August, 1790, and disposing of personal estate only, contained the following clause:

"As I understand, that my late sister Margaret Bell has two grandchildren living in Northumberland County, Virginia, within three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a granddaughter, I give to each of them £500."

A codicil, dated the 5th of January, 1791, contained the following clause:

"And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they being all dead."

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

Evidence proving the identity of the plaintiffs was read.[1]

Lord Chancellor. [Lord Loughborough.]. . . . It appears to me there is no revocation, the cause being false; whether by misinformation or mistake is perfectly indifferent. . . . Declare the legacies not revoked, the parties being alive.[2] . . . .

ATTORNEY-GENERAL *v.* LLOYD.

1 Ves. Sr. 32. 1747.

John Millington, seised of a considerable real and personal estate, made a will in 1734, and gave his real and personal estate to be laid out in purchase of real estate, to his executors and other trustees and their heirs, to apply the rents and profits to payment of some legacies; then to reimburse themselves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and personal estate to certain uses; and that being doubtful, whether by the late Mortmain Act his devise of his real estate to the charity or part thereof would be good, and being desirous to confirm it in that case, and not otherwise, he gives so much of

[1] Only that part of the case which relates to the question of revocation is given.

[2] *Doe* d. *Evans* v. *Evans*, 10 A. & E. 228, *accord*. See *Giddings* v. *Giddings*, 65 Conn. 149; *Whitlock* v. *Vaun*, 38 Ga. 562; *Hayes* v. *Hayes*, 21 N. J. Eq. 265; *Appeal of Mendinhall*, 124 Pa. 387; *Gifford* v. *Dyer*, 2 R. I. 99, *ante* p. 86; *Newton* v. *Newton*, 12 Ir. Ch. 118, 128–130.

his real and personal estate, as could not pass by his will, to the use of his nephew, Millington Buckley, at his age of twenty-one, with limitations over, on his dying without issue, with proper maintenance till that age. He afterward makes *another codicil, reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof,* he gave his personal estate to his executors upon trust, that if it cannot be laid out in land, it may in securities for the same charity; and his real estate he gives unto and for the use of Millington Buckley, at twenty-one; and declares, that it is his opinion, that his estate at L. is sufficient to maintain him during his minority. Upon an information to have the will and codicils so established, as that the charity might be carried into execution; it was decreed at the Rolls that the will was well proved, and that the trusts should be performed, and that a scheme should be proposed for carrying the charity into execution: from which decree the defendant, Millington Buckley, brought the present appeal.

LORD CHANCELLOR. [LORD HARDWICKE.] I am very doubtful about this case, and would put it in a proper way of being determined. This is very different from all the cases cited. The question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves; which make it differ from *Onions* v. *Tyrer;* indeed, Lord Cowper there says, it might be relieved on the head of accident; but I do not know how he could come at it in a question between devisee and heir-at-law. It is proper, therefore, for a court of law; and the same construction must be made as there. The first reason why I doubt, is, that if the testator had intended, as the relators contend, that this was a revocation, and a new devise only in case the will was not good, he would have left it on the first codicil: and no occasion for making a new one; for it would be just the same with respect to the charity as on the first. Another reason, which makes me doubt, is, that it is very nice to say, that because the reason a person gives fails, therefore his devise should fail. I do not know how far that will extend; the testator has put it on the advice he received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law: he might do it in order to quiet the doubtful question; but I do not say he did so. The third and principal reason is, I doubt, whether this disposition is put singly on the point of law: for considering the material words *being advised,* and the subsequent words, who can tell what he meant there? The codicil was made two years after, and his personal estate might be so increased as to be a sufficient fund for the charity; for all this together might be his reason, and it is impossible to say he depended on one more than another. I give no opinion, for it is a mere point of law, and a new case; and will send it in to B. R., to be there

solemnly argued, and reserve further considerations till after the judge's certificate.[1]

SKIPWITH ET ALS. *v.* CABELL'S EXECUTOR ET ALS.

19 Grat. 758. 1870.

JOYNES, J.[2] . . . On the 27th day of November, 1861, the testatrix made a sixth codicil, as follows:

"In consequence of the state of the country, I now revoke my bequests to Dr. Carter and his children, and also to Mrs. Fanny Taylor, her daughter Miss Cornelia Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia." It is contended on behalf of Dr. Carter and his children, that this revocation is inoperative and void, because made under a mistake. To establish the alleged mistake, they refer to the testimony of Mr. Hartsook, who says that in a conversation with the testatrix, he suggested to her, for her consideration, that if she had given property to any of her Northern friends, it might be confiscated under the Sequestration Act [of the Confederate States] — that she replied, that she had done so, and would revoke the bequests; and that she subsequently told him that she had revoked the bequests to her Northern friends, in consequence of the state of the country. The alleged mistake is, that she supposed that these legacies, if not revoked, would or might be confiscated, whereas, it is insisted, the Sequestration Act was wholly void in law; and, moreover, did not confiscate the *corpus* of any property, but only sequestered the profits.

The most that can be made of this evidence is, that the testatrix had been advised by the witness, as his opinion, that the legacies referred to would be liable to confiscation, and that she adopted that opinion by making the revocation. But it is laid down, that if a revocation is made dependent upon the information received by the testator, or upon his belief or opinion, the act will be held valid, notwithstanding he may have been misinformed, or under a misapprehension. 1 Redfield on Wills, 358, pl. 25. It is as if she had said, "I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them." She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation cannot be set aside by showing that the advice was unsound. 1 Powell on Devises, 527; *Atto. Genl.* v. *Lloyd*, 3 Atk. R. 551. Besides, it has not

[1] The question was, "Whether the testator's real estate in S. and S. were well devised by the second codicil, dated the 17th of March, 1736, to the defendant M. B. for life, with remainder over to his first and other sons in tail-male, the said M. B. having attained his age of 21 years," &c. The court certified in the affirmative, whereupon Lord Hardwicke declared and decreed accordingly. — REP.

[2] The statement of facts is omitted and only that part of the opinion which deals with revocation is given.

been shown that the testatrix was under any mistake. The counsel admits that the profits of the legacies would have been liable to confiscation, or to sequestration, which was practically the same thing: and this may have been just what she apprehended. We ought to presume so, if this was the only sort of confiscation that was lawful or usual. And if she apprehended confiscation of the whole, it has not been shown that the apprehension was unfounded.

But the codicil does not state any fact upon the supposition of whose existence the testatrix proceeded in making this revocation. All that she says is, that she revokes the bequests, "in consequence of the state of the country." What there was in the state of the country that caused her to do so, or what she thought or feared in regard to the state of the country, does not appear on the face of the will. In the cases cited by counsel, the fact which the testator assumed to exist, and the assumed existence of which induced the revocation, appeared on the face of the will. But here we are asked to go outside of the will, and to ascertain from parol evidence what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake. No case has been found in which this has been allowed, and to allow it would violate fundamental principles.

The Circuit Court, therefore, was right in holding, that the revocation was valid and effectual.[1] . . .

IN RE BERNARD'S SETTLEMENT.

[1916] 1 Ch. 552. 1916.

NEVILLE, J.[2] In this case under a marriage settlement, and in the events that happened, the wife had a power of appointment by will over the settled funds in favour of her children and issue, and by her will she exercised that power by appointing the funds to her six daughters equally. That, of course, was a perfectly good appointment within the terms of the power in the settlement. By the third codicil to her will she dealt with the share of one of her daughters, the plaintiff, in a way which there is no doubt infringed the rule against perpetuities.[3] She had to vest the share in some person absolutely before the expiration of twenty-one years after her own death, and the provisions which she made by the codicil in favour of her daughter were such as offended against the rule, and were consequently invalid. The important question arises whether under

[1] See *Dunham* v. *Averill*, 45 Conn. 61; *Attorney-General* v. *Ward*, 3 Ves. Jr. 327; *Newton* v. *Newton*, 12 Ir. Ch. 118, 129; *Thomas* v. *Howell*, L. R. 18 Eq. 198, 211.

[2] The statement of facts is omitted.

[3] This codicil expressly revoked the exercise of the power by her will so far as it gave this daughter an absolute interest.

those circumstances the invalidity of the appointment in the codicil destroys the appointment that had been made in favour of the plaintiff by the will, or whether under the circumstances, having regard to the intention of the testatrix and her attempted exercise of the power in the codicil failing, the valid earlier exercise of the power by the will is operative. There is a good deal of authority on the point, and the first case to which I wish to refer is *Onions* v. *Tyrer*, 1 P. Wms. 343. What was decided there was shortly this: A will having been executed so as to pass real estate, and having been subsequently revoked by another will executed so as to be a good revocation but not so as to pass real estate, it was held that the previous devise of the real estate was good and that the revocation was not complete. That case has been considered in subsequent cases. The next case in which a similar point arises is *Tupper* v. *Tupper*, 1 K. & J. 665. In that case certain legacies were given by the testator to certain charities out of his personalty. By a codicil those gifts were revoked, and a gift was made to another charity which was incapable of operation because the money so bequeathed was to be laid out in land and the provisions of the Statute of Mortmain were fatal to the gift. It was then considered whether the gifts to the original charities were untouched by the later gift, or whether as a matter of fact the revocation was conclusive against them so that they took nothing under the will and codicil. It was held, and, if I may say so with respect, inevitably, that the first charities could not take because the testator had taken away from them what he had given them, and there was nothing in his bequest to another charity to show that he intended, if the other charity could not take, that the first charities should have their legacies. I do not think *Tupper* v. *Tupper*, *supra*, presents any difficulties. Then there comes the case of *Quinn* v. *Butler*, L. R. 6 Eq. 225, 227, in which *Onions* v. *Tyrer*, 1 P. Wms. 343, is considered by Lord Romilly. In that case a revocation of an appointment of a certain sum was followed by an appointment of the whole fund to one of the objects of the power, and that appointment was invalid because the power was not an exclusive power. But I think what Lord Romilly says on the principles which apply to cases of this kind is very instructive. He says this: "I think the whole question depends upon the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer*, *supra*, applies. The case has generally arisen where there has been a defective execution of the second instrument." It seems to me that the view there stated by Lord Romilly is a perfectly accurate definition of the principle which ought to guide the Court in coming to a conclusion upon a point of this nature. One other authority to which I must refer is the case of *Duguid* v. *Fraser*, 31 Ch. D. 449, 452, a decision of Kay, J., in which he held that the

subsequent gift, in the events that had happened, having failed, the original gift by the appointor was not revoked. The only reason why I refer to the case is that the learned judge in his judgment refers to previously decided cases in these terms: "There have been cases where the intention to revoke in any event being clear, as where the appointor began the invalid appointment by saying 'I revoke the former appointment to this extent,' and then proceeded to appoint — in which the courts have been compelled by the language to give effect to the revocation, though not to the subsequent appointment. I do not feel myself fettered by anything of that kind." In that case there were no direct words of revocation of the previous gift. Now it was a good distinction no doubt in a sense between the case before him and the cases that had been cited, and I respectfully agree with the conclusion that he came to in the case before him, but I think the words I have quoted might lead to a misunderstanding, because it does not seem to me that the real point is determined by the question of whether there are words of direct revocation or whether such words are absent. I think it is far too narrow a view to apply any such rule in construing documents of this kind, because it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second; and therefore, whether the testator says in so many words "I do revoke," or whether he uses words which necessarily involve revocation, it seems to me the result is the same, and that it would not be a wise distinction to make, except so far as the use of the direct words may be some guide as to the intention of the testator. I think the question which the Court has to determine is, Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment? Turning to the case before me, I think the intention of the appointor is reasonably clear. The testatrix is dealing with a provision she has made for her daughter. In the first instance she has given her an equal share with her other daughters in the funds to be appointed. But then she desires to control the provision she has made for her daughter, and I think the recital in the codicil itself indicates the purpose for which the revocation of the previous absolute gift to the daughter was made. She says "Whereas I am desirous that the share of my said daughter Margaret Bernard of and in the said settled funds and the said legacies and share of my residuary property or the income thereof shall not be paid or transferred to her but be held upon the trusts for her benefit hereinafter declared concerning the same respectively." Now, is not that a clear expression of her intention? She says, in effect, "I am not intending to

deprive my daughter altogether of what I have given her, but what I am seeking to do is to ensure that it shall be properly applied for her maintenance." It seems to me that obviously the intention of the testatrix is only to revoke the previous appointment for the purpose of giving effect to the increased security which she thought her daughter would have by the protecting clauses that she has added in the codicil. There is only one thing which does no doubt militate against that view, and that is the gift over upon the death of the daughter. But I do not think that is strong enough to enable me to come to the conclusion that the testatrix intended to revoke her bounty under her previous appointment in all respects and not only for the purpose of giving effect to the substituted provisions in the codicil. I hold, therefore, applying the rule which Lord Romilly lays down, that in this case, the appointment by the third codicil having failed, the original appointment made by the will remains operative.[1]

D. Revocation by Circumstances.

MARSTON *v.* ROE d. FOX AND HALTON.

8 A. & E. 14. 1838.

THIS case was brought by three writs of error from the Court of Queen's Bench, where judgment had been given for the lessor of the plaintiff on a special verdict. The plaintiff below brought ejectment to recover certain lands in Staffordshire, the trial of which action was removed, by a suggestion on the record, to Gloucester, where it took place before ALDERSON, B., at the Spring Assizes, 1836. Upon the trial, cross bills of exceptions were tendered to, and allowed by, the learned judge; that on the part of the lessor of the plaintiff containing exceptions, as well against admissions of evidence given by the defendant below, as also for the rejection of evidence which he had offered; that on the part of the defendant below for the rejection of evidence only. One of the writs of error was sued out by the defendant below to bring up the judgment which was given for

[1] See *Security Co.* v. *Snow*, 70 Conn. 288; *Blakeman* v. *Sears*, 74 Conn. 516; *Barksdale* v. *Hopkins*, 23 Ga. 332; *Dudley* v. *Gates*, 124 Mich. 440; *County Commissioners* v. *Scott*, 88 Minn. 386; *Hairston* v. *Hairston*, 30 Miss. 276; *Vining* v. *Hall*, 40 Miss. 83, 107; *Gossett* v. *Weatherly*, 5 Jones Eq. 46, 53; *Jones* v. *Murphy*, 8 Watts & S. 275; *Price* v. *Maxwell*, 28 Pa. 23, 39; *Rudy* v. *Ulrich*, 69 Pa. 177; *Teaele's Estate*, 153 Pa. 219; *Melville's Estate*, 245 Pa. 318; *Carpenter* v. *Miller*, 3 W. Va. 174; *Ex parte Ilchester*, 7 Ves. Jr. 348; *Tupper* v. *Tupper*, 1 K. & J. 665; *Quinn* v. *Butler*, L. R. 6 Eq. 225.

As to the effect on a previous testamentary instrument of a duly executed but void will or codicil containing no express clause of revocation, see *U. S. Fidelity Co.* v. *Douglas*, 134 Ky. 374; *Lougee* v. *Wilkie*, 209 Mass. 184, *ante* p. 146; *Austin* v. *Oakes*, 117 N. Y. 577; *French's Case*, Roll. Abr., "Devise," O. 4; *Roper* v. *Radcliffe*, 10 Mod. 230; *Baker* v. *Story*, 23 Wkly. Rep. 147.

the plaintiff, without argument, on the special verdict; and each party brought up his own bill of exceptions by a writ of error sued out by himself.

The jury found for the plaintiff as to the premises stated in the declaration to have been demised by William Halton. And, as to the residue of the premises, alleged to have been demised by W. J. Fox, they found a special verdict. The verdict stated: —

That on January 17th, 1835, John Fox made his last will, duly executed &c., and thereby devised as follows. "I give and devise" &c. (specifying certain messuages and lands), "unto and to the use of my friend, Anne Bakewell, of Uttoxeter aforesaid, spinster, and her assigns, for and during the term of her natural life, or so long thereof as she shall remain sole and unmarried, subject, nevertheless, to impeachment of waste; and, from and after the decease or marriage of the said Anne Bakewell, which shall first happen, I give and devise the said messuages, dwelling-houses or tenements, buildings, yards, gardens, farms, lands and hereditaments, with the appurtenances, to my relation, William Marston, of Manchester in the county palatine of Lancaster, cork merchant, his heirs and assigns forever. And" (after some further devises, not material here, to relations and others) "I give, devise and bequeath all my messuages, farms, lands, tenements, tithes, rents, hereditaments and real estate, and parts and shares of such (not hereinbefore given, devised, and disposed of), wheresoever situate in Great Britain, and whether freehold, copyhold or customary, and whether in possession, reversion, remainder, contingency or expectancy, with all rights, members and appurtenances thereto respectively belonging; and also all my moneys, securities for money, goods, cattle, chattels, rights, credits, effects and personal estate whatsoever and wheresoever, and of what nature, kind or quality soever, unto the said William Marston, his heirs, executors, administrators and assigns forever, according to the respective natures and tenures thereof; nevertheless subject" to debts, etc.

That from March 25th, 1834, down to the time when he executed the said will, the testator contemplated a marriage with the said Anne Bakewell. That he married her on February 21st, 1835, and lived with her until the time of his death. That from the time of his marriage until his death he was in a bad state of health; and that on May 11th, 1835, he was taken ill, and died in about two hours. And that at the time of his death he was seised in fee-simple in possession of the residue of the hereditaments and premises mentioned in the will, and demised by the said William John Fox.

That the said will was, in a short time after the death of the said John Fox, found in his bed room in an oak chest of which he had kept the key; and that Elizabeth Stone, the person who had found the will, had been told by the testator, ten weeks before his death, where he had deposited his will.

That, on the 16th October, 1835, the said wife of John Fox was delivered of the said William John Fox, one of the lessors of the plaintiff, who is the only son and heir at law of the said John Fox.

That the said John Fox was seised in fee of certain lands, tenements, and hereditaments, and continued so seised until the time of his death, out of which lands, tenements, and hereditaments his widow would be entitled to dower, unless she was deprived thereof by the operation of his will, or by operation of law.

That the testator, on 20th November, 1834, had agreed to purchase a house for £690, for the purpose of residing in it when married. That in the draft of conveyance sent to the testator for his perusal was inserted a declaration that "any wife testator might take should not be entitled to dower." That testator requested that such clause should be struck out; and that, upon its being explained to him as he was on the point of marriage, that, if, after he was married, he wished to resell the property, he could not do so without the consent of his wife, he said he was perfectly aware of that, and that he did not intend to debar his wife of dower.

That, on the 30th September, 1829, Joseph Fox, the brother of the said John Fox, entered into a written contract for the purchase of some property at Marston Montgomery, in the county of Derby, at the sum of £463 14*s.* 6*d.*, with Thomas Harrison and others, trustees under the will of John Etches, deceased. That, on 25th March following, the said John Fox was let into possession of the last mentioned premises; but, the titles not being then complete, it was agreed that he should receive the rents and profits from that period, and should pay interest to the said trustees on the purchase-money, until the purchase was completed.

That, after this agreement, the said John Fox, in like manner as the purchasers of other parts of the same estate, which was sold in lots, was let into possession of the property so contracted for by the said Joseph Fox, and let the same to John Deaville, who held the same as tenant, and paid rent half yearly to John Fox, from the said 25th of March, 1830, until the time of his decease, some of which payments were made in the presence of his brother Joseph. That no other contract than the one before mentioned to have been entered into, by the said Joseph Fox with the said Thomas Harrison and others, was made for the sale of the said last mentioned property.

That, on 17th November, 1834, the said Joseph Fox died unmarried and intestate, seised of considerable real estates in fee simple in possession, which thereupon descended to the said John Fox, as his only brother and heir at law; and that John Fox was the sole next of kin of Joseph Fox, and entitled to administration of the personal estate of which he died possessed.

That by lease and release, bearing date 6th and 7th March, 1835, the said property at Marston Montgomery was conveyed by the

surviving trustees under John Etches's will to the said John Fox, in consideration of £463 14*s.* 6*d.*, and he thereupon paid the said purchase-money, and interest thereupon from 25th March, 1830.

That, in August, 1835, the said John Deaville paid half a year's rent, due for the same premises on the 25th March preceding, to John Hordern, who was one of the executors of the said John Fox.

That the value of the real estate left by the said John Fox amounts to about £49,000.

Error was assigned upon the judgment in the common form; and the plaintiff below joined in error.

The plaintiff below (the defendant in error), in his bill of exceptions, stated that the defendant below, on the trial, admitted the title of W. J. Fox as heir at law, and consented to a verdict for the plaintiff below as to the premises stated to have been demised by W. Halton; but that, as to the residue of the premises, he insisted on his own title as devisee under the will of John Fox, dated January 17th, 1835. The plaintiff below then stated the following grounds of exception.

First, that the defendant below (before putting in the will of January, 1835), offered in evidence a will of John Fox, dated March 25th, 1834, in which he bequeathed to William Marston (the defendant below) and another, for the life of Anne Bakewell, an annuity of £40, upon trust to pay the same to her, and not to any husband or assignee, &c.; and he made the annuity payable out of the rents of certain lands, which he bequeathed to the trustees for the term of ninety-nine years (if Anne Bakewell should so long live) for that purpose; and, subject to the above bequests, he devised all his estates, lands, &c., and personalty, to his brother, Joseph Fox, his heirs, executors, &c., forever. That the defendant below likewise offered in evidence a will of John Fox, dated December 1st, 1834, whereby he devised certain messuages and lands to Anne Bakewell for her life, and from and after her decease to the said William Marston in fee; he also bequeathed certain legacies; and, subject, &c., he left all the residue of his real and personal estates to W. Marston, the defendant below, his heirs, executors, &c., forever; and he appointed W. Marston and another his executors. That the counsel for the plaintiff below objected to the admission of these wills of 1834, but that the learned judge received them, whereupon the plaintiff's counsel excepted, &c.

The second ground of exception was the admission in evidence of John Fox's declaration, under the circumstances stated in the special verdict, that he did not intend to debar his wife of dower. The bill of exceptions stated this evidence to have been objected to at the trial, on behalf of the plaintiff below, but received; whereupon &c.

Thirdly, the bill of exceptions stated that the plaintiff below, at the trial, proved the contract entered into by Joseph Fox with

Harrison and others, for the purchase of property at Marston Montgomery, as stated in the special verdict; and it set out the contract as follows: "Joseph Fox, of Uttoxeter, in the county of Stafford, tanner, doth hereby acknowledge himself to be the highest bidder for the purchase of the premises described in the annexed particulars, in lots 2 and 3, under the above conditions, at the price or sum of," &c.; "and he hereby agrees to pay the said purchase monies pursuant to these conditions, and in all other respects to be bound by and perform the same; and the vendors" (naming them) "do hereby agree to sell the said tenements and premises mentioned in this contract, to the said Joseph Fox, under the above conditions, at the prices aforesaid. Dated the 30th day of September, 1829. Joseph Fox, Benjamin Carnell, Thomas Carnell." Then followed a specification of the lots. The bill then stated, as in the special verdict, the facts proved, from the letting of John Fox into possession to the payment of rent by Deaville. It then proceeded: "And the counsel for the said Richard Roe, further to prove the said issue on his part, and for the purpose of shewing that it was the said John Fox who entered into the said contract for the purchase of the said premises at Marston Montgomery, and that the said Joseph Fox was the agent for the said John Fox in that behalf, and had signed the contract as such agent, then and there tendered and proposed to give parol evidence that, on the 30th day of September, 1829, the said Joseph Fox (the brother of the said John Fox) was appointed by the said John Fox his agent, for the purpose of making the agreement aforesaid for the purchase of the said premises; and that, in consequence of such appointment, the said Joseph Fox did, in his own name, but as such agent as aforesaid and on behalf of the said John Fox, sign the said agreement; and that both the said Joseph Fox and John Fox, in the year 1830, within three months after the said agreement was so signed as aforesaid by the said Joseph Fox, gave instructions to one James Blair, the attorney who prepared the deed of conveyance of the same hereditaments and premises, that the same should be conveyed to the said John Fox, and not to the said Joseph Fox; and that the same were so conveyed accordingly." And the bill of exceptions stated that this evidence was objected to by the counsel for the defendant below, and that the learned judge rejected it; whereupon &c.

The plaintiff below assigned for error that the evidence objected to by him "ought not," and that the evidence tendered by him as above mentioned "ought to have been admitted and allowed." The defendant below joined in error.

The defendant below, in his bill of exceptions, stated that it was admitted, on the trial, that the testator contemplated marriage when he made his will of January 17th, 1835. That the counsel for the defendant below offered in evidence certain letters of the testator to him, which were set out, written subsequently to the will, and express-

ing much kindness to the defendant. Also a letter written to the defendant, after the marriage, announcing it, but stating that no act of the testator's should ever prejudice the interest of relatives, and subscribed, "Your truly sincere and affectionate cousin, John Fox." Also a verbal declaration of the testator, a week or ten days before his death, that he had made his will and that he would not alter it, as it was so it should stand; that he had left the chief part of his property to his friend, Mr. William Marston; and that he had taken care the Bakewells should not have any part of his property; and other expressions to a similar effect between the marriage and death of the testator. Also a statement by him, about a month before his marriage, that he was going to be married to Anne Bakewell; that he had made his will; that he had left her a very handsome fortune whether he married her or not; and that he had left Mr. Marston the biggest bulk of his property, by the wish of his brother: and other declarations, both before and after the marriage, importing that his property would fall into the hands of Marston, the defendant below.

The bill of exceptions then stated that the counsel for the plaintiff below objected to the reception of these letters and declarations, and the learned judge excluded them; whereupon &c.

The defendant below assigned for error that the evidence "ought to have been admitted and allowed, to entitle the said defendant to a verdict." Joinder.

An action of trover for the title-deeds of the same estate had been brought by the lessor of the plaintiff against the defendant below in the Court of Exchequer, and came on for trial before ALDERSON, B., at the same assizes; and, as the same question arose in both actions, a course precisely similar was pursued in both; and, for the purpose of avoiding as well unnecessary expense to the parties as loss of time to the respective courts of error, it was thought convenient that the argument of the writs of error in the first mentioned cause should take place in the presence of all the judges of the three courts of Westminster Hall, the parties having consented that both cases should abide the decision of the present.

This case was argued June 13th and November 1st and 27th, 1837, before TINDAL, C. J., LORD ABINGER, C. B., LITTELDALE, PATTESON, WILLIAMS, COLERIDGE, PARK, BOSANQUET, VAUGHAN, and COLTMAN, JJ., and PARKE, BOLLAND, ALDERSON, and GURNEY, BB.

Cur. adv. vult.

TINDAL, C. J., in this term (January 26th) delivered the judgment of the court. After stating the manner in which the writs of error came before the court, his Lordship proceeded. This case has accordingly been argued in the presence of all the judges of England, with the exception of Lord Denman.

On the part of the plaintiff in error (the defendant below), it was

contended that, admitting the general rule to be established, that marriage and the birth of a child operated as the revocation of a will made before the marriage, where the wife and child were left without provision, yet such revocation was grounded on an implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will made, and upon such implied intention only, and consequently that any evidence was admissible on the part of the devisee which showed a contrary intention, in order to rebut such presumption.

On the part of the defendant in error it was contended that such revocation, under the circumstances above supposed, is the consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that, when the state of circumstances under which the will is made becomes so materially, or rather entirely, altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator. The broad question, therefore, which has been argued between the parties has been, whether evidence of the testator's intention that his will should not be revoked is admissible to rebut the presumption of law that such revocation should take place? And we all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself and consequently that no such evidence is admissible. The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases as well in the ecclesiastical courts as in the courts of common law. With respect to the former we cannot but entertain considerable doubt whether their authority can be held to apply to the present question. For, whilst we are entirely convinced of the importance of an uniformity of decision between the courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation, or the same principle of law is under discussion in each; and entertaining, as we do, at the same time, the highest respect for the learning and ability of those by whom justice is administered in the ecclesiastical courts, we cannot forget that in the question now before us *we* have to deal with the provisions of a Statute with which the questions ordinarily coming before *them* are wholly unincumbered. The question now before us relates to the revocation or non-revocation of a will *devising real property;* it is a question whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The ecclesiastical courts, on the other hand, are concerned in

the granting probate of wills and testamentary papers, *relating to personalty only*, in which cases no statutory enactment has excluded parol evidence of the intention of the testator as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on those points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions, therefore, in the ecclesiastical courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And, if that question is to be decided, as we think it is, by the weight of the authorities to be found in the courts of common law, the balance preponderates greatly in favor of the proposition that no evidence of intention is to be admitted to rebut the presumption of law that a will is revoked by subsequent marriage and the birth of a child. The cases relied upon principally by the plaintiff in error (the defendant below) are those of *Brady, lessee of Norris*, v. *Cubitt*, 1 Doug. 31, and *Kenebel* v. *Scrafton*, 2 East, 530; those which are appealed to by the defendant in error (the lessor of the plaintiff) are *Doe dem. Lancashire* v. *Lancashire*, 5 T. R. 49, and *Goodtitle dem. Holford* v. *Otway*, 2 H. Bl. 516. Now, with respect to the case of *Brady, lessee of Norris*, v. *Cubitt*, it must be admitted that the opinion of Lord Mansfield is expressed in terms the most explicit and unreserved, that the presumption of revocation from marriage and the birth of children, like all other presumptions, "may be rebutted by every sort of evidence." But it must, at the same time, be observed that the decision of that case rests also upon other grounds, which are altogether satisfactory and free from objection; viz., first, that the disposition made by the will was of *part only*, not *the whole* of the estate; and, secondly, that the instrument executed after the birth of the child operated *as a republication* of the devise contained in the will. And, as to the case of *Kenebel* v. *Scrafton*, it affords no authority whatever for the position that such implied revocation can be rebutted by parol evidence of a contrary intention existing in the testator's mind, because, in that case, the objects of the marriage were contemplated and provided for by the will, so that there was no implied revocation whatever of the will; and, next, because the question as to the admissibility of such evidence is expressly declared by Lord Ellenborough, in giving the judgment of the court, to be left entirely untouched by the decision of that case.

And, looking, on the other hand, at the cases relied upon on the part of the lessor of the plaintiff, we agree entirely with Lord Kenyon as to the ground upon which the doctrine of implied revocation, under the circumstances now before us, ought to be rested. That very learned judge, in giving his judgment in the case of *Doe dem. Lancashire* v. *Lancashire*, 5 T. R. 58, 59, treats it as a principle of

law, of which he suggests the foundation to be a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family; and this foundation of the rule is confirmed by the judgment of Lord Ellenborough in the case above referred to (2 East, 541), where he says this ground is to be preferred to "any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon." The case, again, of *Goodtitle dem. Holford* v. *Otway*, although not the same in circumstances, yet establishes the very same principle as that contended for by the defendant in error. That case did not indeed relate to the revocation of a will by subsequent marriage and the birth of a child, but to revocation of a will by a subsequent conveyance of lease and release executed for a limited purpose only. But the same principle was laid down, that parol evidence shall not be admitted to show that the testator meant his will to remain in force against the revocation implied by law from the execution of such subsequent conveyance, the Lord Chief Justice Eyre stating his opinion to be, "that, in cases of revocation by operation of law," "the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent, that it does not admit of circumstances to be set up in evidence to repel it. And this makes it difficult," he says, "to understand the case in Douglas (*Brady, lessee of Norris*, v. *Cubitt*), supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds."

And we think this opinion, at which we have arrived, not only supported by the authority of the decided cases, but the only one which is consistent with the provisions of the Statute of Frauds. For, if, against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator leading to the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator leading to a different inference, and of declarations contradictory to the former. And, again, the admission of such evidence leads to this further difficulty, that, if the testator changes his first intention, and adopts a contrary one, which of the two intentions is to prevail? Is it to be the first, which is clearly expressed and proved, or is the latest formed intention, like the last will, to be allowed to predominate? It was precisely to preserve us from the perplexity and uncertainty of such conflicting evidence, both in the making and revoking of wills, that some of the provisions of the Statute of Frauds were expressly framed. We think, therefore, such evidence was inadmissible; and that the rejection of it, when offered by the plaintiff in error (the

defendant below), was right; and that the bill of exceptions, tendered upon that ground by the defendant below, and allowed by the learned judge, has entirely failed.

But the plaintiff in error contends that the rule of law, to which we have adverted, does not apply to the case before us. It becomes necessary, therefore, to determine what is the precise rule of law upon this subject, and to consider the objections urged against its application to the present case. And, upon a careful examination of the several cases which have been decided on this point, we take the rule of law, so far as it is material to the present inquiry, to be this: that, in the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation.

Now, with respect to the rule so laid down, the plaintiff in error objects that the exception to it is not confined to the single case where a provision is made by the will for the children of the marriage, but that the case is also excepted in which a provision is made by the will for either the wife, *or* the children; and, still further, he contends that, if it is necessary that provision should be made for both wife *and* children, it is enough that it is made either by the will itself or any subsequent provision; and that, upon the facts of this case, it appears a provision is made for both in the one way or the other; and that the estate, which was conveyed to the testator after the making of his will, being an after-purchased estate, did not pass thereby, but descended to the child of the marriage as his heir at law, and thereby formed such a provision for him.

With respect to the first objection, we are all of opinion that, under the circumstances above supposed, in order to prevent the revocation of the will, and to take the case out of the general rule, it is not sufficient that a provision is made for the *wife only*, but that such provision must also extend to the children of the marriage.

The children of the marriage, both in the consideration of our law, and of the civil law, from which the rule itself has been adopted, are the subjects of the marked anxiety of both codes of law. This is evident from the preamble to the Statute of Wills, 32 H. 8, *c.* 1, which recites, as the object of the Statute, the enabling the king's subjects to further "the good education and bringing up of their lawful generations," and "to discharge their debts, and, after their degrees set forth, advance their children"; and, still further, the observation of Lord Chancellor Nottingham, in the case of *Pitt* v. *Pelham and Another*, Freeman's Rep. ch. 134, is direct upon the point: "The ground of the Statute of Wills, 32 H. 8, is the good of children and posterity." And no case has been decided, in which the will has been held to be not revoked, where the courts have not

acted on the principle that the provision was not made for the wife only, but extended to the children also. In the case of *Eyre* v. *Eyre*, cited in 1 Peere Williams, 304, the will appears to have been held to be revoked upon the ground that no provision is made for the child. And the case of *Brown* v. *Thompson*, 1 Eq. Cas. Abr. 413, pl. 15 (s. c. 1 P. Wms. 304, note †, 6th ed.), which at first seems to lead to a contrary conclusion, does in fact support the principle now laid down. In that case, the testator had devised an estate to the woman whom he afterwards married, *and her heirs;* and Sir John Trevor, M. R., held the will to be revoked by the subsequent marriage and the birth of a child; which must necessarily have been on the ground that no provision was made for *the child;* and, although this decree was afterwards reversed by the Lord Keeper Wright, yet such reversal (the propriety of which seems very doubtful) expressly recognizes the principle that the children of the marriage must be provided for by the will; for he assigns, as the reason for the reversal, that "no injury is done any person; and those are provided for, whom the testator was most bound to provide for," meaning thereby that the child was to be considered as provided for, by reason of an estate of inheritance having been given to the mother. And the case of *Kenebel* v. *Scrafton* (before referred to) confines the exception to the case where both wife *and* children are provided for by the will.

Taking, therefore, the rule of law to be, that *the children* of the marriage must be provided for in order to prevent the revocation of the will, it is obvious that no provision whatever is made by this will for any child of the marriage; and whether any provision whatever is made for *the wife* by the devise to her of the estate for life, upon the condition expressed in the will, or whether she could claim a provision by her right to dower, we give no opinion whatever, because it is obvious that such provision for the wife, if it exists at all, is limited to her for life only, and cannot be extended in any way to form a provision for the children of the marriage.

But it is further objected that an after-purchased estate did not pass by the will, but descended upon the son in fee, and thereby became a provision for him, and prevented the revocation of the will. In the first place we answer, that no case can be found in which after-acquired property, descending upon the child, has been allowed to have that effect. And indeed such a proposition seems incompatible with the nature of a condition annexed to the will, which, so far as relates to the existence or extent of the provision, must, in its own nature, have reference to the existing state of things at the time the will itself was made. But, secondly, it appears to us a conclusive answer to the objection, that, upon the statement of facts in the special verdict, the testator had in him, at the time of making his will, an equitable interest in the estate in question, which equitable interest passed to the devisee under his will, so that the

subsequent conveyance of the legal estate to the testator would give no real or beneficiary interest to his heir at law, but would make him a trustee for the devisee. For it is well established that an estate contracted for will pass under general words of devise in a will, even though the agreement to purchase is not to be carried into execution until a future day, which does not occur until after the time when the will bears date. See *Potter* v. *Potter*, 1 Ves. Sen. 437; *Greenhill* v. *Greenhill*, Pre. Chanc. 320; see also the case cited from the Rolls in 7 Ves. Jun. 436, 16 Ves. Jun. 253; *Lawes* v. *Bennett*, 1 Cox, 167. And, in this special verdict, it appears that the contract to purchase so entered into by Joseph Fox upon his dying intestate and unmarried, descended upon and came to John Fox, his elder brother and heir at law, and sole next of kin, and the person entitled to take out administration of his personal estate. John Fox, therefore, at any time after his brother's death, had the right to file a bill in equity for the specific performance of the contract, and was therefore seised of the equitable estate at the time of making his will.

Holding, therefore, as we do, that the beneficiary interest in this estate passed under the devise, we consider the descent of the legal estate upon the child of the marriage to have formed no provision for him, but that he was left wholly unprovided for, as he neither took anything under the will, nor anything (if that would have been sufficient) by descent from his father.

We therefore think the will revoked, and that the lessor of the plaintiff is entitled to have the judgment affirmed which has been already given for him on the special verdict. And this makes it unnecessary for us to give any judgment upon the bill of exceptions tendered by the lessor of the plaintiff; for, as he is entitled to our judgment on the facts found by the jury, that bill of exceptions may for the present be considered as wholly immaterial, or as if it had never been tendered at the trial; although, at the same time, we have no hesitation in declaring our opinion to be, that the learned judge was right in admitting the evidence therein mentioned, but wrong in rejecting the evidence which was offered to prove that Joseph Fox entered into the agreement of purchase, stated in the bill of exceptions, as the agent of John Fox.

Upon the whole, therefore, we are of opinion that the judgment of the Queen's Bench must be affirmed.

Judgment affirmed.[1]

[1] In *Israell* v. *Rodon*, 2 Moore P. C. 51, the Privy Council followed the principal case, Sir Herbert Jenner saying, p. 63: "But the case of *Fox* v. *Roe dem. Marston*, being now the last decision upon this point, must, to a certain extent, govern the proceedings in the ecclesiastical courts, and the principles upon which those cases (if any should hereafter arise) are to be determined: because in that case it is expressly laid down that it does not depend upon the presumed intention that the deceased would alter his will under the change of circumstances, but that the rule is, that it is to be considered a *tacit* condition annexed to the will, that at the time of making

that will it should not have any effect, provided the deceased had a wife and child of the marriage subsequently born; and that is the rule now which must be applied, not only in the courts of common law, but also to any cases which may arise in the ecclesiastical courts, with respect to personal property."

Prior to *Marston* v. *Roe d. Fox* the ecclesiastical court had held that marriage of the testator and birth of issue after the making of a will only furnished a presumption of revocation which could be rebutted by parol evidence that the deceased did not intend the will to be revoked. *Johnson* v. *Wells*, 2 Hagg. Eccl. 561; *Fox* v. *Marston*, 1 Curt. Eccl. 494. By the Wills Act, § 18, *ante*, p. 35, a will made by a man or woman is revoked by his or her marriage, except certain wills in the exercise of a power of appointment.

In the United States, when the question has been discussed unaffected by legislation, the rule in *Marston* v. *Roe d. Fox* has been approved in the following cases. *Woodliff* v. *Dunlap*, 187 Ala. 255, 258 (*semble*); *Herzog* v. *Trust Co.*, 67 Fla. 54; *Shorten* v. *Judd*, 60 Kan. 73; *Baldwin* v. *Spriggs*, 65 Md. 373; *Hulett* v. *Carey*, 66 Minn. 327; *Hoy* v. *Hoy*, 93 Miss. 732; *Baacke* v. *Baacke*, 50 Neb. 18, 21, 22 (*semble*); *Francis* v. *Marsh*, 54 W. Va. 545, 548 (*semble*); *Glascott* v. *Bragg*, 111 Wis. 605. But see *Brush* v. *Wilkins*, 4 Johns. Ch. 506; *Wheeler* v. *Wheeler*, 1 R. I. 364; *Yerby* v. *Yerby*, 3 Call 334. In Iowa in the absence of a special statute the birth of a child alone revoked a will. *McCullum* v. *McKenzie*, 26 Iowa 510; *Negus* v. *Negus*, 46 Iowa 487. This rule has been now confirmed by legislation. Annot. Code (1897), § 3276; *Fry* v. *Fry*, 125 Iowa 424.

In some of the United States a rule approximating that of *Marston* v. *Fox* is adopted by statute. A frequent qualification here requires the survival of the wife or child as a condition to revocation. Arkansas, Dig. of Stats. (1904), § 8015; California, Civil Code (1915), § 1298; Hawaii, Rev. Laws (1905), § 2529; Idaho, Rev. Codes (1908), § 5735; Missouri, Rev. Stats. (1909), § 539; Montana, Rev. Codes (1907), §§ 4746, 4747; New York, Consol. Laws (1909), Decedent Estate Law, § 35; North Dakota, Comp. Laws (1913), §§ 5666, 5667; Oklahoma, Rev. Laws (1910), § 5364; Oregon, Gen. Laws (1910), § 7321; South Dakota, Comp. Laws (1913), §§ 1023, 1024; Utah Comp. Laws (1907), § 2754.

It is almost universally enacted by statute, with slightly varying qualifications, that a child, who is born after the will and who is unprovided for, takes the share it would have taken had the deceased died intestate. Generally a posthumous child is here treated as if born in the life of the deceased; and frequently the Statute does not apply if the testator indicates in the will a contrary intention. Alabama, Code (1907), §§ 6160–6162; Arizona, Rev. Stats. (1913), §§ 1214–1216; Arkansas, Dig. of Stats. (1904), § 8019; California, Civ. Code (1915), § 1306; Colorado, Annot. Stats. (1912), § 7871; Connecticut, Gen. Stats. (1902), § 297; Delaware, Rev. Code, (1915), §§ 3251–3262; Georgia, Annot. Code (1914), § 3923 (total revocation); Idaho, Rev. Codes (1908), § 5743; Illinois, Annot. Stats. (1913), § 4211; Indiana, Annot. Stats. (1914), §§ 3116-3117 (total revocation); Iowa, Annot. Code (1897), §§ 3276, 3279 (total revocation); Kansas, Gen. Stats. (1909), §§ 9813, 9816; Kentucky, Stats. (1915), §§ 4847, 4848; Louisiana, Rev. Code (1912), Art. 1705 (total revocation); Maine, Rev. Stats. (1903), c. 76, § 8; Massachusetts, Rev. Laws (1902), c. 135, § 19; Michigan, Stats. (1913), §§ 10998, 11000; Minnesota, Gen. Stats. (1913), §§ 7259, 7261; Mississippi, Code (1906), §§ 5079, 5080; Missouri, Rev. Stats. (1909), § 544; Montana, Rev. Codes (1907), §§ 4754, 4755; Nebraska, Rev. Stats. (1913), § 1311; Nevada, Rev. Stats. (1912), §§ 6215, 6217; New Hampshire, Pub. Stats. (1901), c. 186, §§ 10, 11; New Jersey, Comp. Stats. (1910), vol. 4, p. 5865, §§ 20, 21; New Mexico, Annot. Stats. (1915), § 5870 (*Smith* v. *Steen*, 20 N. M. 436); New York, Consol. Laws (1909), Decedent Estate Law, §§ 26, 28; North Carolina, Rev. Stats. (1908), § 3145; North Dakota, Comp. Laws (1913), §§ 5674, 5676, 5677; Ohio, Annot. Code (1912), §§ 10561, 10563–10565; Oklahoma, Rev. Laws (1910), §§ 8371, 8373, 8374; Oregon, Gen. Laws (1910), § 7325; Pennsylvania, Purdon's Dig. (1903), p. 5135, § 16; Rhode Island, Gen. Laws (1909), c. 254, §§ 23, 24; South Carolina, Code (1912), §§ 3570, 3572, 3573;

TYLER, Appellant *v.* TYLER et Al., Appellees.

19 Ill. 151.

Skinner, J.[1] The case shows, that Stephen H. Tyler and the complainant intermarried in this state, in 1842, and here lived as husband and wife until his death in 1855; that he died, never having had a child, and leaving a considerable estate, real and personal, in this state; and that the defendants claim his estate under a will executed in the State of Connecticut, where Tyler then lived, in 1834; which will devises his entire estate to his blood relatives.

The material question is, whether this will, by the change of condition of the deceased, is revoked.

It is essential to a valid will, that it be the *mind* and *intention* of the maker, in relation to the matters to which it relates, at the *time* of his death. And an instrument executed in legal form, purporting to be a last will and testament, whenever made, is received as the

South Dakota, Comp. Laws (1913), § 1030; Tennessee, Code (1896), §§ 3925, 3926; Texas, Annot. Civ. Stats. (1913), §§ 7865 7868; Utah, Comp. Laws (1907), §§ 2760, 2762, 2763; Vermont, Pub. Stats. (1906), §§ 2946, 2948; Virginia, Annot. Code (1904), §§ 2527, 2528; Washington, Annot. Codes & Stats. (1910), §§ 1326, 1327; West Virginia, Annot. Code (1906), §§ 3148, 3149; Wisconsin, Stats. (1915), §§ 2286, 2288. These statutes have been construed to refer to wills of women, though the word "testator" is used. 1913 D Am. & Eng. Ann. Cas. 1327 note. And see *Flanner* v. *Flanner*, 160 N. C. 126. As to sufficiency of provision for the after-born child under the statutes, see *Shackelford* v. *Washburn*, 180 Ala. 168; *In re Lally's Will*, 121 N. Y. Supp. 467; 198 N. Y. 608; *Pearce* v. *Carrington*, 124 S. W. (Tex.) 469; *Pearce* v. *Pearce*, 104 Tex. 73; 1913 D Am. & Eng. Ann. Cas. 1328 note; 43 L. R. A. N. S. 1195 note. And see *Woodliff* v. *Dunlap*, 187 Ala. 255; *Wood* v. *Tredway*, 111 Va. 526. As to the effect on the will of adopting a child, see *Evans* v. *Evans*, 186 S. W. (Tex.) 815; *Glascott* v. *Bragg*, 111 Wis 605; 30 L. R. A. N. S. 916 note.

By statute in the following states, if the testator fails to provide in his will for a child or for the issue of a deceased child, such child or issue takes the share he would have taken had the deceased died intestate. Generally the statute does not apply, if it appears that the omission was intentional. Arkansas, Dig. of Stats. (1904), § 8020; California, Civ. Code (1905), § 1307; Idaho, Rev. Codes (1908), § 5774; Maine, Rev. Stats. (1903), c. 76, § 9; Massachusetts, Rev. Laws (1902), c. 135, § 19; Michigan, Stats. (1913), §§ 10999, 11000; Minnesota, Gen. Stats. (1913), §§ 7260, 7261; Mississippi, Code (1906), § 5079; Missouri, Rev. Stats. (1909), § 544; Montana, Rev. Codes (1907), § 4755; Nebraska, Rev. Stats. (1913), § 1312; Nevada, Rev. Stats. (1912), §§ 6216, 6217; New Hampshire, Pub. Stats. (1901), c. 186, §§ 10, 11; New Mexico, Annot. Stats. (1915), § 5870; North Dakota, Comp. Laws (1913), §§ 5675–5677; Oklahoma, Rev. Laws (1910), §§ 8372–8374; Oregon, Gen. Laws (1910), § 7325; Rhode Island, Gen. Laws (1909), c. 254, §§ 22, 24; South Dakota, Comp. Laws (1913), § 1030; Utah, Comp. Laws (1907), §§ 2761–2763; Vermont, Pub. Stats. (1906), §§ 2947, 2948; Wisconsin, Stats. (1915), §§ 2287, 2288. And see note, *ante*, p. 284. Compare *Payne* v. *Payne*, 18 Cal. 291; Kansas, Gen. Stats. (1909), § 9816; Kentucky, Stats. (1915), § 4842; Ohio, Annot. Code (1912), §§ 10563–10565.

[1] The statement of facts and the brief concurring opinion of Breese, J., are omitted.

last will and purpose of the maker, until shown to have been revoked in some of the ways known to the law.

Our statute contains substantially the same provisions in relation to revocation of wills, as the English statute of 29 Charles II; and the courts of that country have uniformly held, that *marriage* and the *birth* of a child, effecting a radical change in the condition, relation and duties of one who before had made a will providing for no such contingency or change of condition, by operation of law and presumptively revoke such will; but that marriage alone will not raise such presumptive revocation. Bacon's Ab., title "Wills and Testaments," H; 1 Lomax on Executors, sec. 5; 1 Jarman on Wills, chap. 7, sec. 1; *Sneed* v. *Ewing*, 5 J. J. Marsh. R. 460; *Brush* v. *Wilkens*, 4 John. Ch. R. 507; *Havens* v. *Von Denbury*, 1 Denio R. 27.

By the law of descents, both in England and in this country, the child may inherit the parent's estate; but there the wife is not heir to the husband, while here, she, in case there be no child or descendant of a child of the husband, is such heir and may inherit the one-half of his lands.

The reason of the law is the essence and soul of the law; and the *reason* of the common law rule existing here by force of our statute, making the wife heir to the husband and the husband heir to the wife, where there is no child or lineal descendant, the rule should go with it.

Where a statute of the mother country or of a sister state is adopted into our law, the rule is, that with it is adopted the construction of such statute which, prior to its adoption, uniformly obtained.

The wife, ordinarily, where there are no children to provide for, is a far more meritorious object of the husband's bounty than collateral kinsmen, and is presumed to engage more intensely his emotions of interest and affection. It cannot, therefore, be supposed that he would willingly die leaving her disinherited and unprovided for.

We hold, that marriage under our statute making the wife heir to the husband and the husband heir to the wife, where there is no child, or descendant of a child, is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of it.

Decree reversed and cause remanded.

Decree reversed.[1]

[1] See also *Brown* v. *Scherrer*, 5 Colo. App. 255; 21 Colo. 481; *Colcord* v. *Conroy*, 40 Fla. 97; *Morgan* v. *Ireland*, 1 Idaho 786; *Amer. Board of Com'rs.* v. *Nelson*, 72 Ill. 564; *Duryea* v. *Duryea*, 85 Ill. 41, 50; *In re Toepfer*, 12 N. M. 372. But see *Will of Tuller*, 79 Ill. 99; *Hulett* v. *Carey*, 66 Minn. 327; *Hoy* v. *Hoy*, 93 Miss. 732; *Mundy* v. *Mundy*, 15 Ohio Cir. Ct. 155.

INGERSOLL AND ANOTHER, EXECUTORS v. HOPKINS AND OTHERS.

170 Mass. 401. 1897.

APPEAL, by the heirs at law and next of kin of Charles D. Ingersoll, from a decree of the Probate Court admitting to probate an instrument purporting to be his last will. The case was heard by KNOWLTON, J., who entered a decree affirming the decree of the Probate Court, and, at the request of the appellants, reported the case for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices.

FIELD, C. J. The will of Charles D. Ingersoll, of Boston, was executed on October 20, 1891, and in it he gave all his property to Mary Alice Payson, of said Boston, "single woman," and appointed her one of the executors, and requested that the executors "be required to give no sureties on their official bonds." It appears from the testimony admitted by the justice who reported the case to this court, that the testator and Miss Payson were married on October 19, 1892; that the testator died on September 28, 1896; that prior to the time when the will was executed the testator and Miss Payson had mutually promised to marry each other; that the contract of marriage remained in force from the time of the engagement until the marriage; and that she lived with him as his wife from the time of the marriage until his death. From this evidence in connection with the will the presiding justice found, as matter of fact, so far as he properly could, that it appears from the will itself "by fair inference from its provisions as applied to the parties and the subjects to which it relates, that the will was made in contemplation of the marriage that was subsequently solemnized," and he affirmed the decree of the Probate Court allowing the will.

The question of law in this case depends upon the construction to be given to St. 1892, c. 118, of which the first section is as follows: "The marriage of any person shall act as a revocation of any will made by such person previous to such marriage, unless it shall appear from the will itself that the will was made in contemplation of such marriage, or unless and except so far as the will is made in exercise of a power of appointment and the estate thereby appointed would not, in default of appointment, pass to the persons that would have been entitled to the same if it had been the testator's own estate, and he or she had died without disposing of it by will."

It is manifest, we think, that from the will itself, considered independently of the testimony admitted by the presiding justice, it does not appear that the will was made in contemplation of marriage with Miss Payson. It is impossible to hold, in every case where a testator by his will gives property or all his property to a woman who is unmarried and makes her his executrix, that it appears from this

that at the time when he made the will he contemplated marrying her and made his will in contemplation of such marriage. It does not appear that there was any dispute or uncertainty as to the Mary Alice Payson intended, or that any evidence was necessary to identify her or the estate which was devised and bequeathed to her. The evidence was admitted to show another fact existing at the time when the will was made, namely, that at that time the testator was under a contract of marriage with her, and then, by considering this fact in connection with the provisions of the will, the presiding justice drew the inference that the will was made in contemplation of the marriage with her which afterwards took place. It was in effect conceded by both sides that, although the will was made before St. 1892, c. 118, took effect, yet, as the marriage took place after the statute took effect, the statute was applicable to the case. See *Swan* v. *Sayles*, 165 Mass. 177.

The counsel for the appellees cite the decisions of this court upon the construction of what is now Pub. Sts. c. 127, § 21, which section is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional and not occasioned by accident or mistake." Under the statutory provision which now constitutes this section the court held that parol evidence is admissible to show that the omission by a testator to provide in his will for any of his children or for the issue of a deceased child was intentional, and was not occasioned by accident or mistake. *Converse* v. *Wales*, 4 Allen, 512. But the section does not require that it should appear from the will itself that the omission was intentional, and it well may be that the reason for using the different phraseology in St. 1892, c. 118, was that the Legislature did not intend to leave the question whether a will was made in contemplation of a marriage which subsequently took place to the uncertainty which often attends the proof of facts by oral evidence.

The counsel for the appellees also rely upon the construction which has been given to what is now Pub. Sts. c. 127, §§ 24, 25. *Fay* v. *Fay*, 1 Cush. 93. *Brimmer* v. *Sohier*, 1 Cush. 118. These sections are as follows: "Sect. 24. Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate. Sect. 25. An estate, right, or interest in lands acquired by a testator, after the making of his will, shall pass thereby in like manner as if possessed by him at the time when he made his will, if such manifestly and clearly appears by the will to have been the testator's intention." The decisions are to the effect that the intention of the testator under these sections need not

be declared in express terms in the will, but that it is sufficient if the intention can be clearly inferred from particular provisions of the will, or from its general scope and import. The decisions give no sanction to the doctrine that such intention can be shown by evidence other than that derived from the will itself.

The statute in England on the subject is as follows: "And be it further enacted, That every Will made by a Man or Woman shall be revoked by his or her Marriage (except a Will made in exercise of a Power of Appointment, when the Real or Personal Estate thereby appointed would not in default of such Appointment pass to his or her Heir, Customary Heir, Executor or Administrator, or the Person entitled as his or her next of Kin, under the Statute of Distributions)." 1 Vict. c. 26, § 18. There it is held that no intention of the testator, even though expressed in the will itself, can prevent the revocation of the will by a subsequent marriage. *Otway* v. *Sadleir*, 33 L.T. 46. *In re Cadywold*, 1 Sw. & Tr. 34. Jarm. Wills (6th ed.), 110 *et seq.* Our statute follows closely the English statute, inserting only the exception, "unless it shall appear from the will itself that the will was made in contemplation of such marriage." The intention of our Legislature apparently was not to follow the English statute as interpreted by the English courts, when it appeared from the will itself that it was made in contemplation of a marriage which subsequently took place, but to follow it in other respects, and to exclude from consideration any evidence not derived from the will itself.

The statute of Georgia more nearly resembles ours, and it is there held that parol evidence cannot be received to show that the will was made "in contemplation of the event" of marriage or the birth of a child. *Ellis* v. *Darden*, 86 Ga. 368.

In the opinion of a majority of the court, St. 1892, c. 118, means that when the will is not made in the exercise of a power of appointment, it must be apparent on the face of the will itself that the will was made in contemplation of "such marriage," either by an express declaration in the will to that effect, or by language in the will from which such contemplation may fairly be inferred, otherwise a subsequent marriage "shall act as a revocation."

A decree should be entered that the decree of the Probate Court allowing the will be reversed, and that the will be disallowed, and the case remanded to the Probate Court for further proceedings.

Decree accordingly.[1]

[1] But see *In re Adler's Estate*, 52 Wash. 539.

By statute in the following states marriage of a testator, or marriage under certain conditions, after the making of a will revokes the will. Alaska, Annot. Codes (1907), Part V, c. 15, § 140; Arizona, Rev. Stats. (1913), § 1208; California, Civ. Code (1915), § 1299; Connecticut, Gen. Stats. (1902), § 297; Delaware, Rev. Code (1915), § 3263 (partial revocation to enable wife to take as if deceased died intestate); Georgia, Annot. Code (1914), § 3923; Illinois, Annot. Stats. (1913), § 4211; Indiana, Annot. Stats. (1914), § 3118; Kentucky, Stats. (1915), § 4832; Massachusetts, Rev. Laws (1902), c. 135, § 9; Minnesota, Gen. Stats. (1913), § 7257, Montana, Rev. Codes

EMERY, Appellant.

81 Maine 275. 1889.

Facts agreed. The case was submitted to the full court, upon a statement of the facts, to determine the law as to the effect of the marriage, of the testatrix Esther Hunt, formerly Esther Doughty, upon the validity of her will executed before marriage.

It appeared, that the testatrix was a widow at the time she executed the will; that she subsequently married, but no children were born of the subsequent marriage; that her second husband deceased before the death of the testatrix; and that at the time of the decease of the testatrix, when said will would take effect, if ever, she was single and unmarried. Will dated Nov. 16, 1878. The probate court decreed that said instrument be not approved and allowed as the last will and testament of said deceased.

Walton, J. The question is whether the common-law rule that, the will of a *feme sole* is revoked by her marriage, is now in force in this state. We think it is not. The rule was an outgrowth of the doctrine that the marriage of a *feme sole* destroyed her testamentary capacity. After her marriage she could neither make nor revoke a will. A will already made, if allowed to remain valid, would make a permanent disposition of her property. This would be contrary to the very essence and nature of a will. It would cease to be ambulatory. It was therefore resolved that the marriage of a *feme sole* should, by operation of law, revoke all existing testamentary dispositions of her property. But, in this state, the marriage of a *feme sole* does not now destroy her testamentary capacity. In this particular the common law is not now in force. It has been abrogated by the legislature. A married woman can now make, or alter, or revoke a will, as fully and as freely as if she were not married. Why, then, should her marriage revoke a pre-existing will? We think it should not. *Cessante ratione legis, cessat ipsa lex.* Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. In England it is now enacted that the marriage of either a man or a woman shall revoke a pre-existing will, unless it is executed under a power of appointment. In New York they have a statute which declares in express terms that the marriage of a

(1907), §§ 4746, 4747; Nevada, Rev. Stats. (1912), § 6211; North Carolina, Rev. Stats. (1908), § 3116; North Dakota, Comp. Laws (1913), §§ 5666, 5667; Pennsylvania, Purdon's Dig. (1903), p. 5135, § 16 (partial revocation to enable wife to take as if deceased died intestate); Rhode Island, Gen. Laws (1910), c. 254, § 16; South Carolina, Code (1912), § 3570 (*Will of Roton*, 95 S. C. 118); South Dakota, Comp. Laws (1913), § 1023; Utah, Comp. Laws (1907), § 2754; Virginia, Annot. Code (1904), § 2517; Washington, Annot. Codes & Stats. (1910), § 1323; West Virginia, Annot. Code (1906), § 3138. Compare *In re Estate of Matteote's*, 59 Colo. 566; *In re Petridge's Will*, 47 Wash. 77; *Koontz* v. *Koontz*, 83 Wash. 180; *In re Van Guelpen's Estate*, 87 Wash. 146.

woman shall revoke a pre-existing will. In Massachusetts they have a statute which, as construed by the court, has the same effect. Similar statutes exist in several other states. Where such statutes exist, the question we are now considering cannot arise. In other states, where the testamentary laws and the rights and powers of married women are similar to those now existing in this state, it has been held that the marriage of a *feme sole* will not revoke a pre-existing will. It is said in a New Hampshire case that when the incapacity of a married woman to make a will is removed, no reason remains why her will, made before her marriage, should be thereby revoked. *Morey* v. *Sohier*, 63 N. H. 507, (2 N. E. Rep. 274). And see *Fellows* v. *Allen*, 60 N. H. 439; *Webb* v. *Jones*, 36 N. J. Eq. 163. *Ward's Estate*, (Wis.) 35 N. W. R. 731. *Carey's Estate*, 49 Vt. 236. Our statutes recognize the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker (R. S., c. 74, § 3), but they are silent as to what the changes or circumstances are, which shall have that effect. If the marriage of a *feme sole* now, as formerly, destroyed her testamentary capacity, the change in her condition and circumstances would now, as then, also destroy the validity of an existing will. But such is not now the effect of a marriage. In this state, a *feme covert* can make or revoke a will as freely as a *feme sole;* and the reason no longer exists for holding that the will of a *feme sole* will be revoked by her marriage. It will not be. The decree of the probate court holding the contrary was erroneous, and must be reversed.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

Decree reversed.[1]

[1] *Hastings* v. *Day*, 151 Iowa 39; *Roane* v. *Hollingshead*, 76 Md. 369; *Noyes* v. *Southworth*, 55 Mich. 173; *Kelly* v. *Stevenson*, 85 Minn. 247; *Fellows* v. *Allen*, 60 N. H. 439; *Webb* v. *Jones*, 36 N. J. Eq. 163; *Morton* v. *Onion*, 45 Vt. 145; *Will of Lyon*, 96 Wis. 339, *accord*. But see *Swan* v. *Hammond*, 138 Mass. 45. Authorities are collected in 1913 A Am. & Eng. Ann. Cas. 218 note; 10 Prob. Rep. Ann. 231 note.

By statute in the following jurisdictions if an unmarried woman makes a will and later marries, the will is revoked. Alabama, Code (1907), § 6159; Alaska Annot. Codes (1907), Part V, c. 15, § 140; Arkansas, Dig. of Stats. (1904), § 8016; California, Civ. Code (1915), § 1300; Hawaii, Rev. Laws (1905), § 2530; Idaho, Rev. Codes (1908), § 5737; Indiana, Annot. Stats. (1914), § 3118; Kentucky, Stats. (1915), § 4832; Massachusetts, Rev. Laws (1902), c. 135, § 9; Missouri, Rev. Stats. (1909), § 540; Montana, Rev. Codes (1907), § 4748; Nevada Rev. Stats. (1912), § 6212; New York, Consol. Laws (1909), Decedent Estate Law, § 36; North Carolina, Rev. Stats. (1908), § 3116; North Dakota, Comp. Stats. (1913), § 5668; Ohio, Annot. Code (1912), § 10560; Oklahoma, Rev. Laws (1910), § 8365; Oregon, Gen. Laws (1910), § 7322; Pennsylvania, Purdon's Dig. (1903), p. 5137, § 17; Rhode Island, Gen. Laws (1909), c. 251, § 16; South Dakota, Comp. Laws (1913), § 1024; Virginia, Annot. Code (1904), § 2517; West Virginia, Annot. Code (1906), § 3138. But in Ohio the statute expressly provides to the contrary. Ohio, Annot. Code (1912), § 10560. Compare *In re Comassi*, 107 Cal. 1; *In re McLarney's Estate*, 153 N. Y. 416; *In re Van Guelpen's Estate*, 87 Wash. 146.

DURFEE *v.* RISCH.

142 Mich. 504. 1905.

Edith Durfee presented for probate the last will and testament of Anna B. Risch, deceased. The will was disallowed in the probate court, and proponent appealed to the circuit court. There was judgment for proponent on a verdict directed by the court, and contestant appeals. Reversed.

MONTGOMERY, J. On appeal from the probate court, the circuit judge directed a verdict admitting the will in question to probate. Contestant appeals.

Testatrix, while unmarried, executed the will in question. She subsequently married, and had issue, one child, who survives. The sole question is whether the will of a single woman is revoked by her subsequent marriage, followed by the birth of a child or children. Our statute of wills (section 9270, 3 Comp Laws), which prescribes the formalities required for the revocation of wills, provides that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." There is no doubt that at the common law the marriage of a male testator, followed by birth of issue, operated to revoke a will. This revocation was implied from the changed relations and obligations of the testator, and was based upon the presumption that, had the same conditions and obligations existed at the time of the execution of the will and been taken into account, a different will (if any) would have been made. Page on Wills, § 283; 1 Woerner on American Law of Administration (2d Ed.), § 54. It is difficult to suggest any reason why the same implication of a revocation should not arise in case of a female testatrix. The presumption that, had the same conditions existed at the time of the execution of the will as existed later, the disposition of the estate would have been different, is certainly as strong in the case of a wife and mother as in case of a husband and father.

The proponent argues that the rule as to the revocation of the will of a female was, at the common law, that her subsequent marriage alone revoked the will; that since by statute a married woman may now make a valid will, and since it is generally held that the effect of this statute is to abrogate the rule that marriage alone (in the case of a woman) revokes the rule, it follows that there is left no common-law rule upon which a revocation of a will by a female can be predicated. This is ingenious, but not convincing. It is true that the weight of authority sustains the view that, where statutes like our married women's act (section 8690, 3 Comp. Laws) exist, marriage of a feme sole does not of itself operate to revoke the will. *Kelly* v. *Stevenson*, 85 Minn. 249 (56 L. R. A. 754); *In re Will of Ward*, 70 Wis. 251. This is the rule in this State. *Noyes* v. *Southworth*, 55 Mich. 173.

The common-law rule as to the implied revocation resulting from marriage of the testatrix rested upon the ground that, after marriage, she could not make a new will, and as a will is ambulatory during the life of the testator, the continuing purpose to continue the will previously made in force could not be presumed from mere inaction on the part of one who, because of disability, could not act. Where, as in this state, the reason for this rule fails, the rule fails. It does not follow, however, because the marriage alone does not revoke the will, that marriage and birth of issue do not. The abrogation of this rule places the male and the female on the same plane as to this, *i. e.*, that the subsequent marriage does not of itself revoke the will. But it is illogical to say, because the existence of a more restricted rule to the wills of females prevented the application of the general rule of the common law, that such rule should not be applied to male and female alike, when the removal of the latter's disability makes the general rule applicable. As was said of a similar question in *Lansing* v. *Haynes*, 95 Mich. 16, the common law is not so unbending as to lead to this result.

"The reason of the law is the essence and soul of the law."

In *Noyes* v. *Southworth*, supra, it was said:

"Our Constitution has done away with all the disabilities of coverture on this head, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to any one else on change of condition. * * * There is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage."

But it is further insisted that, as section 9285, 3 Comp. Laws, makes provision for a child born after the making of his *father's* will, the rule that marriage and birth of a child revokes a will previously made by the father is abrogated. It is contended that this provision applies only to a man's will, and it was so held in *Cotheal* v. *Cotheal*, 40 N. Y. 405; but it is at the same time urged that, inasmuch as the rule as applied to a woman's will is applied by analogy, it follows that if the statutes have abrogated the rule as to men it follows that the rule has to women no existence. This contention does not take account of the fact that we are to apply a principle of the common law, and that that principle is not affected by the withdrawal of a class of persons from those to be affected by its operation. We regard this principle of the common law as controlling, and hold that the marriage of the testatrix and subsequent birth of a child to her resulted in a revocation by operation of law.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and MCALVAY, OSTRANDER, and HOOKER, JJ., concurred. [1]

[1] Compare *Nutt* v. *Norton*, 142 Mass. 242.

JONES'S ESTATE.

211 Pa. 364. 1905.

OPINION by MR. JUSTICE POTTER.[1]

The questions presented by this appeal, as stated by the appellant, are:

1. Does a legacy, in these words, "one third to my wife, Mary Brown Jones," lapse, when the wife subsequent to the date of the will, at her own instance, obtains a divorce a vinculo matrimonii?

2. Is a bequest "to my wife Mary Brown Jones" revoked by implication, by reason of absolute divorce? . . . .

It is elaborately argued that as matter of law, the bequest to Mary Brown Jones was impliedly revoked by reason of the divorce. No authority has been cited in support of the proposition that divorce in itself is sufficient to work a revocation of a will, and we are not aware that any exists. The only case which has been cited by counsel as sustaining this position is *Lansing* v. *Haynes*, 95 Mich. 16. But examination shows that the Michigan statute allows the court to determine whether the subsequent changes in the condition or circumstances of the testator are sufficient to work an implied revocation of the will. And the decision in that case rested also upon the fact, that pending the divorce proceeding there was a settlement of the property rights of the parties. A division of the real estate was made, each deeding to the other. An agreement was also made by which the husband conveyed to the wife certain personal property, and she agreed to release him from all demands of every kind or nature. The agreement stated that it, and the deeds executed by them, were intended as a property settlement between them. This was a practical satisfaction of the bequest, and amounted to an ademption.

As we read this decision, it was controlled by the fact of the settlement of property rights between the parties and not by the divorce itself. At common law, the doctrine of implied revocation of a will from change of circumstances did not include divorce. In fact the instances were few, under the common law, in which an alteration of circumstances was held sufficient to justify an implied revocation. Both at common law and under the statutes of most of the states, it is only certain definite changes in the condition or family relations of the testator which impliedly revoke a will, executed before such changes. The great weight of authority is that no changes beyond the few which have been many times specifically enumerated and recognized as sufficient for the purpose can have this effect: Page on Wills, sec. 280. A will may be so easily revoked by the testator

[1] The statement of facts, the auditor's report, the opinions below, and the brief dissenting remarks of Mr. Chief Justice Mitchell are omitted. Only so much of the opinion of Mr. Justice Potter as relates to this second question is printed.

in his lifetime that the courts have been slow in permitting changes in circumstances to do, by implication, what the testator may so readily do for himself. In *Wogan* v. *Small*, 11 S. & R. 141, TILGHMAN, C. J., said: "There is one case, and only one, in which it has hitherto been thought proper to decide, that the revocation of a will might be implied from an alteration of circumstances, and that is, when the testator married and had a child, subsequently to the making of his will; but both circumstances must concur; * * * The danger of this principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step. We have the less reason to resort to implied revocation, as our legislation has provided for the case of subsequent marriage or children by the Act of April 19, 1794, 3 Sm. L. 143. * * * Once establish the judicial habit of examining the situation of a man's fortune or family, and revoking his will, because he has made an absurd or an inhuman disposition of his property, or because we merely suppose he was ignorant of the state of his affairs, or of the law, and no man's will is safe." These words were weighty then, they should be equally so now.

The opening sentences in *Marshall* v. *Marshall*, 11 Pa. 430, are *obiter dicta*, for there was no occasion in that case to consider the question of what was sufficient to justify an implied revocation of a will. That subject was not before the court. The testator in that case, after devising one tract of land to one son and another tract of land to another son, subsequently sold the first tract. It was urged that this would work a revocation of the whole will. But the court decided that the sale affected only the devise of the tract in question, and the residue of the will remained in full force. It was a case of ademption, which applies only to the subject-matter of testamentary disposition. When the subject-matter bequeathed is sold, or disposed of, it is thereby completely extinguished, and nothing remains to which the words of the will can apply. The principle of ademption is entirely distinct from that of an implied revocation of the terms of the will. Ademption has to do with the subject-matter of the bequests, while the doctrine of implied revocation is founded upon a presumed neglect of duty, upon the part of the testator, or upon a change in his family relations. Ademption involves action upon the part of the testator; the doing of some act with regard to the subject-matter, which interferes with the operation of the words of the will. That is he anticipates the gift there made, by bestowing it during his lifetime upon the legatee, or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will. Nothing of that kind has been done in the present case. The testator has not interfered with his estate in any way inconsistent with the terms of his will.

The statutory rules in Pennsylvania, as to the revocation of wills, are reviewed by Read, J., in *Walker* v. *Hall*, 34 Pa. 483, and on page 487 he says, "we have in reality substituted for the common-law rule, one of our own, depending entirely upon our statutory enactments" and he concludes with the statement that our rules are not open to the doctrine of implied presumption. In *Young's Appeal*, 39 Pa. 115, the court held that the testamentary paper was executed under a special power, and not under the statute of wills. Whatever is there said, as to a change in circumstances which create new moral duties, amounting to implied revocation, is *obiter dicta*, in so far as it goes beyond the conditions enumerated in the statutory enactments. The decision was that the will was revoked by the birth of a son to testatrix after the making of the will. While it was the disposition of an equitable estate, yet it followed the principle of the statute.

We are by no means singular in holding to the doctrine that the changed condition of the testator must be within the conditions named in the statutes, for this view prevails largely in other states; for instance, in *Re Comassi's Estate*, 107 Cal. 1, it is said, "in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether the changed condition of the testator is within the condition named in the statute (cites code) * * * The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted under a clause in their statutes, authorizing a revocation to be 'implied by law for subsequent changes in the condition of the testator.'" And in *Davis* v. *Fogle*, 124 Ind. 41. "It is manifest that no act, thing or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills." In *Noyes* v. *Southworth*, 55 Mich. 173, the court says: "There is no sound reason that we can perceive why, in the absence of statutes, implied revocation should be extended." And in Schouler on Wills, sec. 427, it is said: "In short, revocation of a particular will by mere inference of law or presumption, is limited to a very few instances in our modern practice. Modern legislation itself repudiates in England and some of our states, the old theory of implied intention to revoke on the ground of alteration of circumstances, and what is left of that theory aside from such statutes it would be very difficult to say."

A case much like the present, is *Card* v. *Alexander*, 48 Conn. 492. There the bequest was to "my wife Amelia." A year and a half after the execution of the will, the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, without changing his will. It was held that the bequest was not to be regarded as conditioned upon the wife continuing to be such until his death;

and that the divorce did not as matter of law impliedly revoke the will. The circumstances of the divorce in that case spoke more strongly against the claimant than here. In the present case, it was the misconduct of the testator which caused the divorce.

We can see nothing in the facts of this case which would justify any extension of the doctrine of implied revocation. The reason which lies behind the doctrine as defined both in the common law and by the statutes, is that some obvious injustice may be prevented. That some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. What would be the result of holding in this case, that the change in circumstances worked a revocation? Only this: the whole estate of testator would go to his son, to the entire exclusion therefrom of his former wife and the mother of his child. Can it be said that the obtaining by the wife of a divorce, by reason of the misconduct of the testator, entailed upon him any moral duty to destroy the provision, which he had made in his will, for the woman who was for years his faithful wife, in order to pile up far more than a competency for their child.

The only inference which can be drawn from the record in this case, is that the testator, and he alone, was responsible for the rupture of the marital ties. It may well be, then, that by the provision in his will he intended to make some reparation for the sorrow and distress he brought upon his wife. To impute to him such intention would be more kind, than to presume, as is urged in the argument, that he was filled with resentment, and became possessed by an ignoble purpose which he failed to carry out. He must have known that he could change or destroy his will at any time, yet he did not do so.

We agree with the conclusions reached and stated by the auditing judge in his careful and able opinion, that "To hold under the facts in this case that the divorce revoked this bequest would not be in accordance with statutory regulations, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication; and would be contrary to the express and implied intention of the testator."

The specifications of error are overruled. The decree of the orphans' court is affirmed and this appeal is dismissed, at the cost of the appellant.[1]

[1] *Estate of Brown*, 139 Iowa 219; *Baacke* v. *Baacke*, 50 Neb. 18, *accord*. See also *Card* v. *Alexander*, 48 Conn. 492; *Charlton* v. *Miller*, 27 Ohio St. 298. But see *Lansing* v. *Haynes*, 95 Mich. 16; *Wirth* v. *Wirth*, 149 Mich. 687; *Donaldson* v. *Hall*, 106 Minn. 502; *Will of Battis*, 143 Wis. 234. Compare *Collard* v. *Collard*, 67 Atl. (N. J.) 190; *In re Boddington*, 25 Ch. Div. 685.

SECTION IV.

THE REPUBLICATION AND REVIVAL OF WILLS.

BARNES *v.* CROW

4 Bro. Ch. 2. 1792.

WILLIAM BALCOMBE being seised and possessed of real and personal estate, made his will, bearing date 29th November, 1784, duly attested to pass real estate, and thereby gave and devised all his messuages, &c., and all other his real estate, situate at Feversham, in the county of Kent, or elsewhere, to the plaintiffs in trust to sell, and dispose of the money arising therefrom, in the manner thereby directed. After making the said will, the testator made a codicil thereto, bearing date 5th November, 1785, not duly attested to pass real estate, and by which he made some provisions arising from the marriage of one of his daughters. After the making and publication of his will and such first codicil, he contracted with Richard Horton, for the purchase of an equity of redemption of premises in Feversham, then in mortgage to Mary Hulbard, for a term of five hundred years; and Richard Horton, by indentures of 2d and 3d January, 1786, conveyed to testator and his heirs, the premises, subject to the mortgage debt, and Mary Hulbard dying before the mortgage-money was discharged, the executors, by indentures of 4th September, 1786, in consideration of the payment of the mortgage-money and interest due, conveyed (by the direction of the testator) the term of five hundred years to Thomas Roper, and the testator covenanted to pay the mortgage-money, and entered into a bond to Roper for that purpose. After this transaction, the testator made another codicil to his will, dated 27th October, 1788, whereby he made some alterations in the state of his affairs, and disposed of a leasehold estate, but which did not mention the lands purchased since the date of the will, which concluded thus: "In witness whereof I, the said testator William Balcombe, have to this my writing contained in this, and part of the preceding sheet of paper, which I declared to be a codicil to my said last will and testament, and which is to be accepted, and taken as part thereof, set my hand, &c.," and the execution thereof was attested by three witnesses.

The first codicil was begun and partly written upon the last sheet of the testator's will, and was a continuation from the foot of the said will, and the second codicil was begun, and partly written upon the last sheet of the first codicil, and was a continuation from the foot of the said first codicil, and the testator's will and codicils were annexed to each other, by, or at the request of, the testator.

The defendants, who were heirs-at-law and in gavelkind of the tes-

tator, having got into possession of the lands purchased after the will, the devisees in trust filed the present bill, submitting that the latter codicil was a republication of the testator's will, and that the after-purchased lands passed thereby, and praying a declaration to that purpose, and that the defendant might be decreed to deliver to the plaintiffs possession thereof.

Lord Commissioner Eyre pronounced the judgment of the court to this effect: —

This cause stood over, in order that the court might look into the cases of *Acherly* v. *Vernon* [Com. 381], and *Attorney-General* v. *Downing* [Amb. 571].

The question might be considered as of great difficulty, if it was not so determined that the court is not at liberty to review it; because the two cases seem to be directly opposite. But it appears that *Acherly* v. *Vernon* is determined; and it is a case of such authority that everything must give way to it, and must be considered as determined by it. It is a case of great weight, because it was first determined by Lord Macclesfield, and affirmed by the House of Lords, after questions put to the judges. It was there held that the codicil, "ratifying and confirming the will," amounted to a republication, and became incorporated with it. It is matter of deduction from thence, that the publication of such a codicil in the presence of three witnesses, is a republication of the will.

There are four cases stated, in the report of that case, as having been cited; two of which seem of importance. In the first (*Lytton* v. *Lady Falkland*) the words were, "I make this codicil, which I will shall be added to, and be part of, the will I have formerly made." Here was a manifest reference to the will, and a declaration that the codicil was meant to confirm it, and all that annexation relied upon in the *Attorney-General* v. *Downing*. Lord Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, decreed it was no republication, "because, since the Statute 29 Car. 2, there can be no devise of lands by an implied republication; for the paper in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses." This was on the 16th June, 1708.

In the other case, *Penphrase* v. *Lord Lansdown*, 11 Ann, upon the Earl of Bath's will; the will was made 11th Oct., 1681, and only executed: but on the 15th August, 1701, the testator made a codicil, and, sending for seven persons, published it in these words: "This is my will, and I publish this codicil as part thereof." Here was a strong republication of the will; but it was held by Parker, C. J., and the Court of King's Bench to be no republication, for, since the Statute 29 Car. 2, there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. But, at the importunity of the defendant, a special verdict was found.

Here is a rule of construction upon the Statute of Frauds, clearly expressed and positively laid down, by the first men of their day, and that early after the passing of the Statute, that there cannot be an implied republication; nothing short of a re-execution of the will shall be sufficient. In *Acherly* v. *Vernon* it is clear, that Lord Macclesfield did not adhere to his own rule in *Penphrase* v. *Lord Lansdown*, because the will was there (in *Acherly* v. *Vernon*) held to be republished without re-execution, and consequently must have been republished, notwithstanding the Statute of Frauds, by implication.

If the rule first laid down by Cowper and Lord Macclesfield is not sound, and the will may be republished by implication, I do not wonder that Lord Hardwicke, in Amb. 93 (*Gibson* v. *Rogers*), should express doubts on the special grounds, upon which it was argued before him, that a codicil executed before three witnesses might amount to a republication, and inclined to agree that every codicil duly attested may be a republication of the will.

If we disentangle ourselves from the rule, the declaration of the testator at the publication, as to a former will, must be admitted, because the codicil becomes part of that former will; and the will being attested by three witnesses, the declaration is attested by three witnesses, and does not break in upon the principle of the Statute.

Before the Statute, any declaration of the testator would have been sufficient to republish the will: since the Statute, a re-execution seems not necessary, but the declaration must be in writing, and attested by three witnesses. With respect to the words used in the declaration, Lord Hardwicke might well say, in *Gibson* v. *Rogers*, that he could see no great difference between the words used there, "I desire that this codicil may be adjudged to be part and parcel of my will," and the words, "I confirm or republish my will," which it had been admitted in the argument would have been sufficient.

In the *Attorney-General* v. *Downing*, Lord Camden supposed that a particular intent to republish ought to appear, and that annexation or a particular declaration in the codicil, of the intent, would be sufficient.

If so, not only Lord Hardwicke's opinion, but *Acherly* v. *Vernon*, cannot stand; for, as there was no express republication, but the testator referred to, and made alterations in the will, and gave demonstration that he considered it as his will, — and that was considered as a republication: but he had it not in his intention to do any formal act to republish his will.

I am inclined to stand upon the general proposition of Lord Hardwicke, and to think that the will before us was republished.

The present case has circumstances that seem to bring it within that of the *Attorney-General* v. *Downing*. The testator meant his will to operate upon all his lands, and thought that the will was brought down, by the codicil, to the time of his death. He has annexed the codicil to the will, not by wafers, or folding them together,

but by an internal annexation. So that, in fact, the whole was published together, at the time of publication of the codicil. But I am afraid of relying upon these circumstances, for fear of intrenching upon the Statute of Frauds, by raising a republication out of evidence in its nature parol: I think it better, therefore, to rely on the general ground.

The next question is, what will be the effect of this opinion upon the cause; upon which I have a doubt. The prayer of the bill seems to seek a declaration from us, that the codicil is a republication of the will, and acts on the after-purchased estate. The question of republication might have been tried at law in an ejectment.

Mr. Hall, for the plaintiffs (in the absence of *Mr. Solicitor-General*), stated, that the bill charged the estates in question to be affected by a mortgage-term then outstanding, that the heir was in the possession, and prayed that the defendants might deliver up such possession to the plaintiffs. That notwithstanding the case of *Bristow* v. *Pegge*, 1 Term Rep. 758, and other similar determinations in the time of Lord Mansfield, in which it had been held, that, as between the heir and devisee a mortgage-term could not be set up to nonsuit the plaintiff in ejectment, but the plaintiff should recover subject to the charge: yet, in the subsequent case of *Doe, on the demise of Hodsden* v. *Staple*, 2 Term Rep. 684, a contrary doctrine had prevailed, it having been there determined, that a plaintiff must recover on a legal, not an equitable title, for that a mortgage may be set up as a bar to the plaintiff, even though he claim only subject to the charge; therefore a court of equity alone could, in the circumstances of this case, administer relief.

Lord Commissioner Eyre assented to this; and declared, that, in those circumstances, the ground for equitable interference was plain, and proceeded to pronounce the decree; by which he

Declared the will well proved, and the trusts to be carried into execution; that the codicil is a republication of the will, and the after-purchased estate passed thereby.

After the decree pronounced, Mr. Mitford mentioned a case of *Billing* v. *Turner*, before Lord Kenyon at the Rolls, where there was a similar decree.

Lord Commissioner Wilson also added the case of *Heylin* v. *Heylin*, B. R. 15 Geo. 3. Cowp. 130;[1] where the codicil was held a republication, and observed that the testator, saying "I desire the codicil shall be part of my will," is equivalent to saying [they] shall be one instrument.[2]

[1] In the report in Vesey [1 Vesey, Jr. 499], the case stated to have been cited by Lord Commissioner Wilson, is *Doe* v. *Davy*, Cowp. 158. — Rep.

[2] See *In re Ladd*, 94 Cal. 670; *Kendall* v. *Kendall*, 5 Munf. 272; *Corr* v. *Porter*, 33 Gratt. 278; *Beckford* v. *Parnecott*, Cro. El., 493; *Acherly* v. *Vernon*, Comyns 381; *Pigott* v. *Waller*, 7 Ves. Jr. 98; *Goodtitle* v. *Meredith*, 2 M. & S. 5; *In re Earl's Trusts*, 4 K. & J. 673; California, Civ. Code (1915), § 1287; Georgia, Annot. Code (1914), § 3924.

GREEN *v.* TRIBE.

9 Ch. D. 231. 1878.

Elizabeth Love, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay the income to her niece, Ellen Love, during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum of £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favor of my niece Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into

and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two sixteenths, or would go according to the will and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

FRY, J., after stating the facts of the case, continued: —

It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will and testament there referred to had been described by its proper date, and as if the testatrix had declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me. First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions

which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord Penzance in *Lemage* v. *Goodban*, Law Rep. 1 P. & M. 57, "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the Statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is, whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force — in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer. The first to which I desire to refer is the case of *Crosbie* v. *Macdoual*, 4 Ves. 610. There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil. In the case of *Smith* v. *Cunningham*, 1 Add. 448, a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough* v. *Martin*, 2 Add. 239), there was no intention to revoke. In *In the Goods of De la Saussaye*, Law Rep. 3 P. & M. 42, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England

by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon* v. *Lord Reay*, 5 Sim. 274; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron* v. *Aaron*, 3 De G. & Sm. 475, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton* v. *Newbery*, 1 Ch. D. 234, the present Master of the Rolls took a different view. There the testator made a will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second

codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon* v. *Lord Reay*, but referring without disapproval to the earlier case of *Crosbie* v. *Macdoual*.

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. *Doe* v. *Hicks*, 8 Bing. 475; *Farrer* v. *St. Catherine's College*, Law Rep. 16 Eq. 19.

I conclude, therefore, that the decision of the Master of the Rolls in *Burton* v. *Newbery* does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie* v. *Macdoual* and the cases which have followed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice Blackstone describes it (2 Bl. Com. 450, Kerr's ed.), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of *Wade* v. *Nazer*, 1 Rob. Ecc. 627, the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Upfill* v. *Marshall*, 3 Curt. 636, the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing, unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original dispositions intended for them. This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object. I notice the argument, therefore, only for the purpose of rejecting it. The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.[1]

IZARD *v.* HURST.

Freeman C. C. 224. 1698.

THE defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this court, that where

[1] See also *Wikoff's Appeal*, 15 Pa. 281; *Lee's Estate*, 16 Pa. Sup. Ct. 627; *McLeod* v. *McNab*, [1891] A. C. 471.

a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.[1]

MATTER OF McCAULEY.

138 Cal. 432. 1903.

CHIPMAN, C. Jennie C. McCauley duly executed a will on February 12, 1900, in which she, among others, made several bequests to charitable institutions. On March 16, 1900, she duly executed a codicil to this will. She died April 14, 1900, twenty-eight days after the execution of the codicil. The state, by the attorney-general, filed objections and contest to the petition for final distribution, so far as concerned the charitable bequests, and prayed that they be adjudged void, and that they be distributed to the state for the support of the common schools. The trial court adjudged the said bequests to be valid, and decreed distribution accordingly. The state appeals from the decree. The codicil did not attempt to change any of the charitable bequests or any of the general provisions of the will, but related solely to specific bequests and devises to certain individual legatees. It stated that "the foregoing codicil * * * was, at the date hereof, * * * signed, sealed, and published as, and declared to be, together with the will set forth on the preceding pages, to be her last will and testament," etc.

Section 1313 of the Civil Code provides as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator." Section 1287 of the same code reads as follows: "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." The testatrix left "no relatives or next of kin," as she declared in her will, and, as seems to be conceded by respondents, the bequests in question will escheat, if as to such bequests the will is invalid.

Appellant's contention is, "that the effect of the republication of the will by the codicil of March 16, 1900, and the testatrix dying in less than thirty days thereafter, is to invalidate all the bequests to charity contained in the will."

[1] See *Tanton* v. *Keller*, 167 Ill. 129, 142-143; *Trustees of Unitarian Society* v. *Tufts*, 151 Mass. 76, *post*. p. 338; *Langdon* v. *Astor*, 16 N. Y. 9, 57; *Alsop's Appeal*, 9 Pa. 374; *Hayes* v. *Welling*, 96 Atl. (R. I.) 843. Compare *Davis* v. *Taul*, 6 Dana 51.

Appellant cites numerous cases to the effect that the codicil brings the will to it, and makes it the will from the date of the codicil. Some of the cases speak of the codicil as a republication of the whole will at the date of the codicil. Still others hold that the codicil operates as a republication of the will, the effect of which is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. *Payne* v. *Payne*, 18 Cal. 292 (p. 302), and *In re Ladd*, 94 Cal, 670, are cited as in line with the authorities elsewhere holding as above stated. In the Ladd case it was said that "the execution of the codicil had the effect 'to republish the will as modified by the codicil' (Civ. Code, sec. 1287), as of the date of the codicil. (*Payne* v. *Payne*, 18 Cal. 302.)" Again, "the effect of its execution was to republish the entire will, and not merely the clause so modified, 'as if the testator had inserted in the codicil all the words of the will.'" (*Doe* v. *Walker*, 12 Mees. & W. 597.) In giving construction to the will it was said that "the whole of the original will and the codicil are to be construed as a single instrument executed at the date of the codicil, and of which all the parts are to be construed 'so as, if possible, to form one consistent whole.'" (Civ. Code, sec. 1321.) But it was also said: "A codicil is never construed to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil (1 Jarman on Wills, 176.) 'The dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give it effect, and a clear disposition made by the will is not revoked by a doubtful expression or inconsistent disposition in a codicil.' (*Kane* v. *Astor*, 5 Sand. 533.) 'The different parts of a will, or of a will and codicil, shall be reconciled, if possible, and where a bequest has once been made, it shall not be revoked, unless no other construction can fairly be put upon the language used by the testator. (*Colt* v. *Colt*, 32 Conn. 446. See, also, *Wetmore* v. *Parker*, 52 N. Y. 462; *Johns Hopkins University* v. *Pickney*, 55 Md. 365.)'" No one for a moment can suppose that the codicil in the present will was intended to disturb the bequests made in the original will in aid of the charities named. These bequests were not only left untouched by the codicil, but the testatrix declared that "the foregoing codicil * * * was * * * published as, and declared to be, *together with the will set forth on the preceding pages, to be her last will.*" That the testatrix intended her bequests first made in the will to stand unaffected by the codicil can admit of no doubt, and yet we are asked to give such construction to section 1287 of the Civil Code as shall destroy a large number of her bequests and practically nullify the testatrix's clearly expressed intention with respect to them. We have seen that no such construction can be given to the codicil itself; can we, or, rather, are we compelled to, so construe the statute as to destroy these bequests, and

thus thwart the design of the testator? Section 1292 provides that, "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: 1. By a written will, or other writing of the testator, declaring such revocation or alteration * * *; or, 2. By being * * * destroyed, with the intent and for the purpose of revoking * * *" And section 1317 provides that "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." In construing section 1287 we must keep in view the various sections relating to the subject of wills, and must so construe that section as to preserve the letter and spirit of all the provisions of the statute so far as possible. The section should have such construction, if it is possible in reason to do so, as will carry out the known intention of the testator. Section 1313 invalidates the charitable bequest, unless the will is "duly executed at least thirty days before the decease of the testator." When the will is once "duly executed," it remains the will of the testator until revoked. This may be done as prescribed in section 1292. A codicil does not disturb the will, except so far as it is inconsistent with it, or in terms, or by necessary intendment, revokes it. As was said in the Ladd case, "Where a bequest has once been made, it shall not be revoked, unless no other construction can fairly be put upon the language used by the testator."

For some purposes, no doubt, the will speaks from the date of the codicil, but this is true only so far as the codicil requires that it should so speak. It is entirely consistent with the statute and the codicil now before us, that the contested bequests should stand as made of the date of the will. The testatrix declared the will as first executed to be her will, except as to the changes made in the codicil, and the statute (sec. 1287) says that the effect of the codicil is "to republish the will, as modified by the codicil," and not otherwise. To construe the statute as is contended for by appellant, is to leave a large part of the estate undisposed of, as well as to defeat the object of the testatrix. We do not think it should be given any such construction.

A statute of Pennsylvania, referred to as the act of April 26, 1855, provided: "No estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic or to any person in trust for religious or charitable uses, except the same be done by deed or will attested by two credible witnesses, at least one calendar month before the decease of the testator or alienor." In 1879 an act was passed in that state by which it was provided "that every will shall be construed with reference to the real or personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator."

In *Carl's Appeal*, 106 Pa. St. 635, the will was executed September

6, 1877; a codicil was executed March 14, 1881, and the testator died April 4, 1881. It was contended that the charitable bequests of the will were void. In construing the act of 1879 with that of 1855, the orphans' court, Gibson, J., speaking of the effect of the republication of a will by a codicil, said: "There is a class of cases about which there can be no contention, such as *Neff's Appeal*, 48 Pa. St. 501, in which the question was whether the codicil revoked a second will and republished an earlier will on which it was written. * * * But we find that in all other cases, since the modern statutes of wills, which may arise out of the execution of a codicil, questions regarding the intention of the testator are involved to such an extent as to qualify the rule invoked here materially," citing instances, in one of which (*Alsop's Appeal*, 9 Pa. St. 374) this distinction is shown: "That though for some purposes a will and codicil are to be regarded as making but one testament, they will not be considered as a single instrument where a manifest intention requires otherwise." Other cases are cited to show, for example, that the first will would have been revoked by the second will but for the codicil which gave it life, "and yet it did not affect the validity of the charitable bequests in the first will. This could only be on the ground of its being a separate instrument." (*Hamilton's Estate*, 74 Pa. St. 69; *Brandish* v. *McClellan*, 100 Pa. St. 607; *Neff's Appeal*, 48 Pa. St. 501.)

The learned justice concludes: "The question raised here as to the period from which this will speaks, based upon the doctrine of republication by a codicil, would make void the charitable bequest given by the original will, contrary to the intention of the testatrix. The very act of republication, *ipso facto*, would make null and void that which republication by intendment of law reaffirms. I think the validity of the residuary bequest * * * is not affected in any way by the codicil, and that it does not bring the bequest within the prohibition of the act of 1855." On appeal, the views of the orphans' court were fully indorsed. In further support of the decree it was said: "The fault of the opposing counsel lies in confounding a legal fiction with a physical fact. Of course, all wills must speak as of the time of the testator's death. It is a pure legal fiction that they were *executed* at that time. The fact of actual execution remains, and is entirely unaffected by the fiction. Whenever the *factum* is material, of its own force, in determining results, it will be treated as of the date of its actual occurrence." Our statute (Civ. Code, sec. 1287) certainly does not by its terms compel the construction urged by the attorney-general. To give to it such construction we must import into the statute a legal fiction. This we might do in some cases, but not where it would result in defeating the clearly expressed intention of the testatrix.

The judgment should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFARLAND, J., HENSHAW, J., LORIGAN, J.[1]

[1] See *Hamilton's Estate*, 74 Pa. 69; *Sloan's Appeal*, 168 Pa. 422; *In re Moore*, [1907] 1 Ir. 315. Compare *Hubbard* v. *Hubbard*, 198 Ill. 621; *Tyson's Estate*, 47 Pa. Sup. Ct. 108, 113; *In re Rayer*, [1903] 1 Ch. 685; *In re Smith*, [1916] 1 Ch. 523.

"In my opinion, then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it. What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so, if it is to be read as if I had written it over again; the 'present' treasurer would be a different person. So I conceive if I had said, I devise all the estates of which I am now seised. I afterwards purchase lands and republish my will. I confess I think the same principle applies as governed Lord Cottenham in *Cole* v. *Scott* [1 Hall & Tw. 477]. My will must be read in the same way as if I had said, I give all the lands of which I, on this 24th day of March, 1851, am seised, and if I republish that in 1852, it will still be read just as it was before; it will refer only to that which is there mentioned. Now, the cases in which this question has often arisen and with which we are familiar are these: where a party says by his will, 'I give all my lands,' what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having intermediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, 'all the estates which I had power to give.' Therefore, it seems to me that the distinction is manifest between an express date or an express named fixed upon. You cannot alter that by saying you republish the will at a different time. You do republish it so as to make it operate from that other later time, and if there be any legal effect that is brought to operate by what has taken place in the meantime, you have the benefit of that. But you cannot alter the meaning of the will, which you will be doing if, by republishing the will, you are to treat the testator as having meant something by his will different from that which he has there expressed. With regard to the case in the Court of Error of *Williams* v. *Goodtitle* [10 B. & C. 895], I think that is all perfectly intelligible and right. A testator there, under the old state of the law, devises all his lands: that passes all he was then seised of; he republishes his will afterwards by a codicil, the legal effect of that is to pass after-purchased land, because the will speaks from that time. In both cases it means all the lands he had power to dispose of by law. The effect could not be altered by the circumstance that in his codicil he truly recites that by his will he had devised all he was then seised of; it only states what is the legal effect of his will. He republishes his will: the legal effect of republishing it must have its full operation. It does not seem to me that that case at all presses upon me. I was turning in my mind whether I could recollect any cases in which there was this sort of devise, 'I give to all my present children,' then an after-born child, and a codicil republishing the will: certainly, according to my impression, that would not give to the after-born child. I am not clear that that would quite govern the case, because the courts have stretched a good deal about children in a way that they have not done in other cases. I rather think that it would not. At the same time, I was not prepared for this sort of argument, and have therefore not looked into the point. If, upon looking into it, or being assisted by any suggestion from counsel on one side or the other, anything should be brought to my mind to show I am wrong, I should be most ready to admit it, and the more so because I do firmly believe that this would have been what the testator would have wished to do if his attention had been called to it. I think, although I cannot so construe what he has written, I do form a very shrewd guess as to what he would have written if his attention had been called to it, and he would have wished to write something which would have the meaning that it is contended the republication of the will does give

GOODRIGHT d. GLAZIER *v.* GLAZIER.

4 Burr. 2512. 1770.

This cause had been tried at the Sussex Assizes: where a verdict had been given for the plaintiff, the heir-at-law to the testator, against the defendant, who was his devisee in two wills.

It now came before this court, upon a motion on the part of the defendant for a new trial; which was opposed by *Mr. Dunning* (*Solicitor-General*), *Mr. Burrell*, and *Mr. Kemp*, on the part of the plaintiff; who argued, that *both* wills were revoked; and consequently their client took as heir-at-law.

The question turned upon the revocation of the *first* will, *by making the second.*

The short of the case was this. The former will (being a will of *lands*) was made in 1757: the second, in 1763. The *former* was *never cancelled:* the *second* was *cancelled by the testator himself.* Both wills were in the testator's custody, at the time of his death: the second, *cancelled;* the first, *uncancelled.*

His Lordship observed, with regard to the case *Ex parte Hellier* in 3 Atk. 798, that Mr. Atkyns only reports what passed in Chancery. There might be other circumstances appearing to the Ecclesiastical Court, which might amount to a revocation of a will of *personal* estate.

Here, the testator has, by *both* wills, devised the lands in question, *to the defendant.* His cancelling the second is a declaration "that he does not intend *that* to stand as his will." Does not that speak, "that his first will *shall* stand?" If he had intended to revoke the first will, when he made the second, it must have operated as a declaration "that the defendant should *not* take." But that could not be his intention; because he devises to the defendant by *both.*

As to cases of revocation of devises of land, contrary to the intention of the testator (as the case of the Earl of Lincoln, and many

to it. I do not find that within the four corners of the will, therefore I do not act upon it as the intention which is to govern me." — *Per* Cranworth, V. C., in *Stilwell* v. *Mellersh*, 20 L. J. Ch. 356, 361.

"This case does not present much difficulty. The testator by his will devised a freehold cottage and the land and appurtenances thereto belonging, which he described as 'now in my own occupation,' to trustees upon certain trusts. After the date of his will he bought two other fields adjoining the cottage, and then he made a codicil shortly before his death by which he substituted other trustees for those named in his will, and confirmed his will in other respects. This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed to the trustees together with the cottage and its appurtenances. This was the first point argued, and on it there can be no doubt." — *Per* Lindley, L. J., in *In re Champion*, [1893] 1 Ch. 101, 115. See *Haven* v. *Foster*, 14 Pick. 534, 543.

more), they turned upon legal subtleties. They have been *determined;* and therefore must govern all similar cases: but none of them are applicable to the present question.

Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is *not* his will. Here, he had two. He has cancelled the second: it has no effect, no operation; it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.

MR. JUSTICE YATES concurred with LORD MANSFIELD, for the same reasons. A will has no operation, till the death of the testator. This second will never operated: it was only intentional. The testator changed his intention; and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it. In the case of *Onions* v. *Tyrer*, there was no intention to die intestate: and therefore the heir-at-law was not let in. *Hellier's Case* might be rightly determined: there might be *collateral* evidence of an intention to revoke. That was a will of *personal* estate.

By the Statute of Frauds, "No devise in writing of *lands*, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing, *declaring the same;* or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall *remain and continue in force*, until the same be burned, &c.; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, *declaring the same.*" Now here are none of these circumstances used in what is pretended to be a revocation of this first will. Therefore the *first* will stands good.

MR. JUSTICE WILLES declared the same opinion; and gave the same reasons; particularly repeating the clause in the Statute of Frauds concerning revocations: which showed, he said, that this is no revocation.

MR. JUSTICE ASTON was in Chancery, as one of the Lords Commissioners.

LORD MANSFIELD mentioned a cause at the delegates, between *Mason* v. *Limbrey;* where the testator, Samuel Mason, had made his will, of his real and personal estate; and properly executed two duplicates of it: one of which duplicates he kept in his own hands; the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate; and began to write over a new will, but never finished it: nor did he ever apply to Limbrey, to get back his duplicate. Sentence was given for the

duplicate of the first will remaining in Mr. Limbrey's hands: for the imperfect sketch of the unfinished second will was no revocation of the first. He did not mean to die intestate. So, in the case now before us; if this second will is *not* the testator's will, it is no revocation of the first: he did not mean to die without any will at all.

The rule for a new trial was made absolute: and it was without payment of costs.[1]

PICKENS, ADMINISTRATOR, *v.* DAVIS.

134 Mass. 252. 1883.

APPEAL from a decree of the Probate Court, allowing the will of Mary Davis. Hearing at May Term, 1881, before MORTON, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in October, 1882, and was afterwards submitted on briefs to all the judges.

C. ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In *Reid* v. *Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laughton* v. *Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence

[1] "If a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former; if he afterwards destroy the revocation, the first will is still in force and good:" *Per* LORD MANSFIELD, in *Harwood* v. *Goodright*, Comp. 87, 92.

Randall v. *Beatty*, 31 N. J. Eq. 643 (*semble*); *Bates* v. *Hacking*, 28 R. I. 523; 29 R. I. 1; *Taylor* v. *Taylor*, 2 Nott & M'C. 482, *accord*. And see *Stetson* v. *Stetson*, 200 Ill. 601.

Under the Wills Act, § 22, *ante*, p. 36, a will revoked by a later will cannot be revived by the destruction of the later will. *Major* v. *Williams*, 3 Curt. Eccl. 432; *Goods of Steele*, L. R. 1 P. & D. 575.

In the following jurisdictions the statutes provide in substance as follows: No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re-execution thereof, or by a duly executed codicil, and then only to the extent to which an intention to revive the same is shown. District of Columbia, Code (1911), § 1627; Kentucky, Stats. (1915), § 4834; Virginia, Annot. Code (1904), § 2519; West Virginia, Annot. Code (1906), § 3140. And see Hawaii, Rev. Laws (1905), § 2528; *Stewart* v. *Mulholland*, 88 Ky. 38; *P' Pool* v. *P' Pool*, 121 Ky. 588; *Rudisill* v. *Rodes*, 29 Gratt. 147.

and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has often been said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.) 154–156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824 in *Usticke* v. *Bawden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a later, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also *Moore* v. *Moore*, 1 Phillim. 406; *Wilson* v. *Wilson*, 3 Phillim. 543, 554; *Hooton* v. *Head*, 3 Phillim. 26; *Kirkcudbright* v. *Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch* v. *Phillips*, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "If a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (page 529, *n.*). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict. *c.* 26, § 22 of which provided, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this Statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. *Major* v. *Williams*, 3 Curt. Ecc. 432; *James* v. *Cohen*, 3 Curt. Ecc. 770, 782; *Brown* v. *Brown*, 8 El. & Bl. 876; *Dickinson* v. *Swatman*, 30 L. J. (N. S.) P. & M. 84; *Wood* v. *Wood*, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. *Cutto* v. *Gilbert*, 9 Moore, P. C. 131. See also *Nelson* v. *McGiffert*, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in *James* v. *Marvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in *Simmons* v. *Simmons*, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin* v. *Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell* v. *Lively*, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late Act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also *Barksdale* v. *Hopkins*, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. *Bohanon* v. *Walcot*, 1 How. (Miss.) 336; *Scott* v. *Fink*, 45 Mich. 241. It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. *Lawson* v. *Morrison*, 2 Dall. 286, 290; *Boudinot* v. *Bradford*, 2 Yeates, 170; s. c. 2 Dall. 266; *Flintham* v. *Bradford*, 10 Penn. St. 82, 85, 92.

On the other hand, in *Taylor* v. *Taylor*, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall* v. *Beatty*, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, Statutes have been enacted substantially to the same effect as the English Statute above cited, showing that wherever, so far as our observation has extended, the

subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other States. Concerning these Statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence.[1] Under

[1] *Blackett* v. *Zigler*, 153 Iowa 344; *Williams* v. *Williams*, 142 Mass. 515; *Williams* v. *Miles*, 68 Neb. 463, 469–472; Lane v. Hill, 68 N. H. 275, 283 (*semble*); *Moore's Case*, 72 N. J. Eq. 371; *McClure* v. *McClure*, 86 Tenn. 173; *Gould's Will*, 72 Vt. 316, *accord*. And see *Lively* v. *Harwell*, 29 Ga. 509; *Harwell* v. *Lively*, 30 Ga. 315; *Colvin* v. *Warford*, 20 Md. 357, 391–393; *Flintham* v. *Bradford*, 10 Pa. 82; *Kerchner's Estate*, 41 Pa. Sup. Ct. 112; *Manning's Estate*, 46 Pa. Sup. Ct. 607. Many authorities are collected in 4 Am. & Eng. Ann. Cas. 313 note; 1913 E. Am. & Eng. Ann. Cas. 120 note; 37 L. R. A. 561 note; 14 L. R. A. N. S. 937 note; 13 Prob. Rep. Ann. 28 note.

the Statute of England, and of Virginia, and perhaps of other states, such revival cannot be proved in this manner. *Major* v. *Williams*, and *Dickinson* v. *Swatman*, above cited; *Rudisill* v. *Rodes*, 29 Grat. 147. But this results from the express provision of the Statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of *Sugden* v. *St. Leonards*, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a pre-

As to the possibility of revival where the will attempted to be revived has been destroyed, see *Hale* v. *Tokelove*, 2 Rob. Eccl. 318; *Newton* v. *Newton*, 12 Ir. Ch. 118; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342.

sumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen* v. *Keen*, L. R. 3 P. & D. 105, is to the same effect. See also *Gould* v. *Lakes*, 6 P. D. 1; *Doe* v. *Allen*, 12 A. & E. 451; *Ustieke* v. *Bawden*, 2 Add. Ecc. 123; *Welch* v. *Phillips*, 1 Moore P. C. 299; *Whiteley* v. *King*, 10 Jur. (N. S.) 1079; *Re Johnson's Will*, 40 Conn. 587; *Lawyer* v. *Smith*, 8 Mich. 411; *Patterson* v. *Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited in *Collagan* v. *Burns*, 57 Maine, 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court

Reversed.[1]

CHEEVER *v.* NORTH.

106 Mich. 390. 1895.

MONTGOMERY, J.[2] This is an appeal from the judgment of the circuit court probating the will of Merchant H. Goodrich, who died February 19, 1892. The will probated bore date May 12, 1888. It was in testimony, and not disputed, that deceased, in December, 1888, or January, 1889, executed another will, to which Dr. John Greenshields and R. L. Parkin were witnesses. There was also testimony tending to show that the will offered for probate was

[1] By statute in the following jurisdictions it is provided that, if, after making a will, the testator shall execute a second will, the destruction, cancellation, or revocation of the second will shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive it, or unless he shall duly republish his first will. Alabama, Code (1907), § 6175; Arkansas, Dig. of Stats. (1904), § 8023; Alaska, Codes (1907), Part V, c. 15, § 146; California, Civ. Code (1915), § 1297; Idaho, Rev. Codes (1908), § 5734; Indiana, Annot. Stats. (1914), § 3115; Kansas Gen. Stats. (1909), § 9815; Missouri, Rev. Stats. (1909), § 543; Montana, Rev. Codes (1907), § 4745; Nevada, Rev. Laws (1912), § 6210; New Mexico, Annot. Stats. (1915), § 5868; New York, Consol. Laws (1909), Decedent Estate Law, § 41; North Dakota, Comp. Laws (1913), § 5665; Ohio, Annot. Gen. Code (1912), § 10562; Oklahoma, Rev. Laws (1910), § 8363; South Dakota, Comp. Laws (1913), § 1022; Utah, Comp. Laws (1907), § 2753; Washington, Annot. Codes & Stats. (1910), § 1329. See Georgia, Annot. Code (1914), § 3918. Compare *Barker* v. *Bell*, 46 Ala. 216; *In re Lones*, 108 Cal. 688; *Kern* v. *Kern*, 154 Indiana 29, 38; *Beaumont* v. *Keim*, 50 Mo. 28; *Matter of Simpson*, 56 How. Prac. 125; *In re Stickney's Will*, 161 N. Y. 42; *Osborn* v. *Rochester Trust Co.*, 209 N. Y. 54; *In re Kathan's Will*, 141 N. Y., Supp. 705; *In re Kuntz's Will*, 148 N. Y. Supp. 382.

[2] Parts of the opinion are omitted.

found among the papers of deceased, and that no other will or codicil was found. The jury found, in answer to special questions, that the Greenshields and Parkin will was destroyed by decedent, and that a codicil, of which an abstract was in evidence in the case, was executed as a codicil to the will offered for probate, and that Goodrich also destroyed this codicil. The jury further found that the subsequent will, known as the "Greenshields and Parkin Will," was executed by Goodrich and that it made a complete disposition of his estate. There was no finding by the jury, nor was there any evidence, upon the subject of whether the subsequent will contained a revocation of the prior will, in terms.

1. The circuit judge charged the jury, in effect, that a second will, which contained an express revocation of a prior will, would have the effect to revoke it, but that, if the later will contained no clause revoking the former will, the subsequent destruction of the later will by the testator would revive the former will. There is an irreconcilable conflict of authority upon the question of the effect of the destruction of a second or subsequent will upon an earlier one. The great weight of authority is to the effect that the execution of a subsequent will, containing an express clause revoking the former will, operates as a revocation at once, and that the former will thus revoked cannot be subsequently revived, except by republication, and is not renewed by a destruction of the later will. *James* v. *Marvin*, 3 Conn. 576; *Pickens* v. *Davis*, 134 Mass. 252; *Scott* v. *Fink*, 45 Mich. 241, and cases cited. But we think the weight of authority, and also the previous expressions of this court in *Scott* v. *Fink*, favor the doctrine that, as to a will containing no express clause of revocation, it does not have the effect, of its own force, to revoke the former will, and that the destruction of such later will effects a revival of the earlier will. The cases which maintain this doctrine rest upon the ground that all wills are, in their nature, ambulatory until the testator's death, at which time, and not before, the testament becomes operative. *Flintham* v. *Bradford*, 10 Pa. St. 82; *Peck's Appeal*, 50 Conn. 562; *Simmons* v. *Simmons*, 26 Barb. 77; and cases cited *supra*.

We are cited to the statute (section 5793, 2 How. Stat.) which provides:

"No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence and by his direction; or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will."

And it is urged, with much show of plausibility, that the execution of a new will operates, under this statute, to revoke the former will. Such, however, is not the strict reading. If, at the common

law, a will duly executed is ambulatory, and is held, for the purposes of this question, to take effect only at the death of the testator, we think the statute should be construed as having reference to the common-law rule. The revocation may be by some other will, but it occurs when the will takes effect, not when executed. This statute no more than declares the common law on the subject. . . . In *Scott* v. *Fink* it was said:

"There seems to have been a material distinction, and on good ground, between the state of a former will, after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation, through its dispositions, upon the estate.". . .

2. The burden of proof is upon a party who asserts that the later will contained a clause of revocation. Thornt. Lost Wills, § 115; Beach, Wills, § 73; *Cacman* v. *VanHarke*, 33 Kan. 333. . . .

Other questions are presented by the appeal of the contestants, which we have examined, but deem it unnecessary to discuss in this opinion. We think no error was committed to the prejudice of the contestants. . . .

The other Justices concurred.[1]

MATTER OF CAMPBELL.

170 N. Y. 84. 1902.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 13, 1901, which affirmed a decree of the Albany County Surrogate's Court admitting to probate a certain instrument as the last will and testament of Ellen Campbell, deceased.

The facts, so far as material, are stated in the opinion.

[1] See *James* v. *Marvin*, 3 Conn. 576; *Peck's Appeal*, 50 Conn. 562; *Colvin* v. *Warford*, 20 Md. 357, 391; *Danley* v. *Jefferson*, 150 Mich. 590; *Bohanon* v. *Walcot*, 1 How. (Miss.) 336; *In re Diament's Estate*, 84 N. J. Eq. 135; *Hawes* v. *Nicholas*, 72 Tex. 481; *Noon's Will*, 115 Wis. 299.

GRAY, J. This was a proceeding for the probate of a will and of a codicil of Ellen Campbell, deceased, and it therein appeared that she had executed, at different times, and there were existent, two wills and a codicil. On July 6, 1897, one will was executed; on July 19, 1899, another will was executed and on December 7, 1900, an instrument was executed by the testatrix, which declared itself to be a "codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897." The will of 1899 modified, or changed, the provisions of the will of July, 1897, in respects relating to legacies given and in giving new legacies. Each of these wills was executed with the requisite statutory formalities and contained the usual revocation clause. The codicil of 1900 modified some provisions of the will of 1897, expressly revoked others and added some legacies. It made no reference to the will of 1899. The will of 1897 and the codicil thereto of 1900 were admitted by the surrogate to probate, as constituting the last will and testament of the deceased; while the will of 1899 was refused probate, as having been revoked. The conclusions of the surrogate in those respects were unanimously affirmed by the Appellate Division and the Home for Aged Men, a legatee under the will of 1899, appeals to this court from the decision below.

Although it is found as a fact by the learned surrogate that the testatrix, by the execution of the codicil in 1900, republished her will of July, 1897; nevertheless, the finding is, in its nature, a legal conclusion from the facts and the question of law is in the case. It is contended, on the part of the appellant, that the statutory provisions with respect to the destruction, cancellation and revocation of a will, are applicable to the present case. (1 R. S. chap. 6, tit. 1, art. 3, sec. 53.) They, clearly, are not. Whether the earlier will was revived by the destruction of a later will is not the question; nor does the validity of testatrix's action with respect to the prior will depend upon verbal declarations, as in the *Matter of Stickney* (161 N. Y. 42). The question is whether the execution by the testatrix of the codicil revived and republished the earlier will of 1897, a completely executed and existent instrument, so that the two instruments, together, constituted the final testamentary disposition of her estate. That such is, generally, the effect of a codicil and that the will thereby republished speaks from the date of the codicil is a proposition settled upon authority. (*Van Cortlandt* v. *Kip*, 1 Hill, 590; *Brown* v. *Clark*, 77 N. Y. 369; *Matter of Conway*, 124 ib. 455.) That there intervenes, between the will referred to in the codicil and the codicil itself, another will, executed by the testatrix and, in terms, revoking other wills, does not affect the result; because the codicil to the earlier will implies its existence and effects, impliedly, if not expressly, the revocation of the intermediate will. Of course, there can be no question that the purpose of the testatrix was to re-establish her earlier will; for the title given to the instru-

ment, its subject-matter and the circumstances of its preparation, with the will before her, clearly indicate it. Equally clear, too, should it be that the testatrix purposed the abandonment of her second will. There is no reason in the law why her manifest purpose should not be given effect. The object of the Statute of Wills is to effectuate that which is proved to be the last will of a deceased person. To that end, it prescribes certain formalities of execution, whereby the possibility of imposition, or of fraud, is minimized. When a codicil is executed with those formalities, it is a final testamentary disposition and the will, to which it is shown to be the codicil, if itself an existent and a completed instrument, according to the statute, is taken up and incorporated; so that the two taken together are deemed to, and necessarily do, express the final testamentary intentions. In such a case, it must, logically and manifestly, follow that any other will, or codicil, prior in date to the codicil in probate, is revoked and the presence of express words to that effect, in the codicil, is unnecessary. (See 1 Williams on Executors, [6th Am. ed.] pp. 251–252; 1 Jarm. on Wills, [5th Am. ed.] *pp. 114–191; *Brown* v. *Clark, supra; In the Goods of Reynolds*, L. R. [3 Probate & Divorce] 35.)

In *Brown* v. *Clark*, a married woman executed a codicil, which, in terms, referred to and republished a will executed by her before her marriage, and it was held that it effected a re-establishment and a valid publication of the will, which had been revoked as the effect, under the statute, of the marriage. In the English case cited, *In the Goods of Reynolds*, a will had been executed in 1866, and a codicil to it in 1871. Later in 1871, another will was executed, revoking all previous wills and codicils. In 1872, a codicil was executed, entitled: "This is a codicil to the will of B. R., dated May, 1866." Probate was decreed of the will of 1866 and of the codicil of 1872, by which it had been revived. The codicil of May, 1871, was held not to be revived, as there was nothing to show such an intention.

I think the judgment below is right and that it should be affirmed, with costs to the respondents, the Albany Historical and Art Society and the executors, to be paid out of the estate.

PARKER, Ch. J., BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur; O'BRIEN, J., not voting.

Judgment affirmed.[1]

[1] See *Neff's Appeal*, 48 Pa. 501; *James* v. *Schrimpton*, 1 P. D. 431; *Goods of Gordon*, [1892] P. 228; *Goods of Reade*, [1902] P. 75.

CHAPTER IV.

LAPSED, VOID, AND ADEEMED DEVISES AND LEGACIES.

SECTION I.

LAPSED AND VOID DEVISES AND LEGACIES.[1]

WRIGHT *v.* HALL.

Fort. 182. 1716.

THE case ss. The testator devised all that his messuage and tenement in Edmonton to Francis Carter and his heirs, and all the rest and residue of his messuages, land, tenements and hereditaments in Edmonton, Enfield, and elsewhere, to John Lammas, his heirs and assigns forever.

After the making this will, the aforesaid Francis Carter, the devisee, died in the lifetime of the testator, so that this became a lapsed devise by his death; and then the sole question in ejectment was, Whether this latter clause of the will would carry over the lapsed devise to John Lammas, the residuary devisee, or whether it should descend to the heir at law of the testator?

It was admitted, that such a residuary clause would carry over a lapsed legacy[2] to a residuary legatee from an executor; but the doubt was, whether it would carry it from the heir at law.

Those who argued that it would not, cited many authorities in the books, where 'tis expressly adjudged, that an heir at law shall not be disinherited, but by very plain and clear words, or by some necessary implication from express words, which show, that the testator did intend to disinherit him.

The court held, that the devise of all the rest and residue of my messuages, lands, &c. did not convey what was expressly devised before: for wills must be construed from the intent of the testator at the time of making the will, which appears to be to give his whole estate to Carter and his heirs, in that messuage; and at the time of the will made, he had no rest and residue left in that house, and the devise to Carter being void, the house will go to the heir at law, and not to John Lammas.

This was the authority and foundation of another case which was of the same nature; viz. that the *rest and residue of my lands un-*

[1] Many authorities are collected in 44 L. R. A. N. S. 789 note.

[2] And so of a void legacy. *Sandusky* v. *Sandusky*, 261 Mo. 351; *Wood's Estate*, 209 Pa. 16. Compare *Cornwell* v. *Mount Morris Church*, 73 W. Va. 96.

devised must be meant at the time of making the will; and this was the case of *Roe and Fludd*, Pasch. 2 Geo. 2. [Fort. 184.][1]

MOLINEAUX *v.* RAYNOLDS ET AL.

55 N. J. Eq. 187. 1896.

REED, V. C.[2]

. . . Charles T. Raynolds died, leaving a will by which he left of this property thirty-six hundredths to his son Edward H., thirty-two hundredths to his son Charles T., and thirty-two hundredths to Edward H., as trustee for his son William W. His son Charles T. died before his father, and the question is whether his share passed to Mrs. Adelaide Raynolds under the residuary clause of the will, or whether it was undisposed of by the will, and so passed to the two sons as heirs-at-law of their father.

The two sons, in their own right, make no claim to any interest in their deceased brother's share, but the wives of the two sons claim an inchoate right of dower in the same, grounded upon what they claim to be the legal estate of their respective husbands as heirs-at-law. Mary S. is the wife of Edward H., and Mattie C. is the wife of William W. Raynolds. At common law, whenever a devise lapsed by the death of the devisee, before the death of the testator, the property passed to the heirs-at-law, while lapsed legacies, instead of passing to the next of kin, fell in the residuum, and so passed, under a will, to the residuary legatees. This distinction between the course taken, under the same condition of affairs, by

[1] And see *Batchelder, Petitioner*, 147 Mass. 465; *Doe d.* Morris v. *Underdown*, Willes 293.

In *Cambridge* v. *Rous*, 8 Ves. Jr. 12, Sir William Grant, M. R., said, p. 25: "It has been long settled, that a residuary bequest of personal estate (for it is otherwise as to real) carries, not only every thing not disposed of, but every thing, that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean, that the residuary legatee should take what is given from him: no; for he does not contemplate the case: the residuary legatee is to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estate the heir at law takes; but in the case of personal property the residuary legatee is preferred either to the next of kin or the executor." Compare *In re Bartholomew's Will*, 143 N. Y. Supp. 695; *In re Sinnott's Will*, 148 N. Y. Supp. 637; 214 N. Y. 667; *In re Kathan's Will*, 153 N. Y. Supp. 366; *Blight* v. *Hartnoll*, 23 Ch. D. 218; *In re Fraser*, [1904] 1 Ch. 726.

On the lapse of a legacy given in satisfaction of a debt or of a moral obligation, see *McNeal* v. *Pierce*, 73 Ohio St. 7; *Williamson* v. *Naylor*, 3 Y. & C. Exch. 208; *Stevens* v. *King*, [1904] 2 Ch. 30, 33.

[2] Only part of the opinion is given.

lapsed devises and lapsed legacies, seems to have sprung from the fact that no real estate acquired by the testator, after the execution of his will, passed under the residuary clause, while such a clause included all personal property owned by the testator at the time of his death not otherwise given, no matter when acquired.

Now, by our statute of wills, these instruments become operative upon real property acquired after, as well as before, the date of the execution of the will. Rev. p. 1248. By this act devises and legacies are put upon the same footing, and it would seem that inasmuch as the residuary clause carries all the personalty left undisposed of by other parts of the will, the same should naturally be its effect in regard to realty. Similar statutes in other states have been judicially declared to extinguish all difference between lapsed legacies and lapsed devises, in this particular, and that both pass into the residuum in default of a contrary intention manifested on the face of the will.

This is the law of this state. In *Executors of Shreve* v. *Shreve*, 2 Stock. 385, Chancellor Williamson suggests the query whether the statute did not abolish the distinction between real and personal property in the particular mentioned; and in *Smith* v. *Curtis*, 5 Dutch. 345, it was expressly held by the supreme court that the rule upon which the distinction between lapsed legacies and lapsed devises had arisen should not be kept up, as the reason upon which the rule rested had been removed. It was held, in that case, that a lapsed devise passed into the residuum.

Under the doctrine laid down in this case, the share of Charles T. passed to Mrs. Adelaide Raynolds under the residuary clause of the will.[1] . . .

DOE d. FERGUSON ET AL. *v.* HEDGES.

1 Har. (Del.) 524. 1835.

CLAYTON, C. J.[2] Mary James being seised in fee of the premises in question by her will duly executed, dated 30th July, 1831, gave and devised to "Saint Andrew's Church in Wilmington, all a certain

[1] *Galloway* v. *Darby*, 105 Ark. 558; *Holbrook* v. *McCleary*, 79 Ind. 167; *Thayer* v. *Wellington*, 9 Allen 283, 295; *Clark* v. *Mack*, 161 Mich. 545 (*semble*); *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337, 351; *Reeves* v. *Reeves*, 5 Lea 653; District of Columbia, Code (1911), § 1631; North Carolina, Revisal (1908), § 3142; Rhode Island, Gen. Laws (1909), c. 254, § 7; Virginia, Annot. Code (1904), § 2524; West Virginia, Annot. Code (1906), § 3145, *accord*. Compare *Faison* v. *Middleton*, 88 S. E. (N. C.) 141. *Rizer* v. *Perry*, 58 Md. 112; *Massey's Appeal*, 88 Pa. 470 (but see Pennsylvania, Purdon's Dig. (1903), p. 5145, § 24); *Coleman* v. *Jackson*, 126 S. W. (Tex.) 1178 (but see *Moss* v. *Helsley*, 60 Tex. 426); Georgia, Annot. Code (1914), § 3907; Kentucky, Stats. (1915), § 4843, *contra*.

A renounced specific devise passes to the residuary devisee. *Garrison* v. *Day*, 36 Ind. App. 543; *Albany Hospital* v. *Albany Guardian Society*, 214 N. Y. 435; *Bradford* v. *Leake*, 124 Tenn. 312.

[2] Only the opinion is given.

lot of land therein described, to have and to hold the use of the said house and lot to the said church forever; but not to be sold on any account whatever." And after bequeathing sundry legacies, there is this clause in her will: "Item, I give, bequeath and devise to William Ball and Mary Ball, children of James Ball, deceased; and to John McKnight all the residue of my estate real and personal of whatever kind it may be." The lessors of the plaintiff are the residuary devisees.

It is not contended in this case that the devise to Saint Andrew's Church, passes any estate in the premises in question to the church; but it is admitted that the devise is void by the laws of this State. That question was decided at the last May Term in Kent, in the *State, Use of Wiltbank et al.* v. *Bates*. The question here is, who take? the heirs-at law of Mrs. James, or her residuary devisees?

Since the case of *Doe on the demise of Morris* v. *Underdown*, Willes, 293, that question seems to be completely settled in England. In that case the distinction, as far as we can ascertain, was first established between a lapsed devise, and a void devise. The principles laid down by the Chief Justice in that case were these: that the intent of the testator ought always to be taken as things stood at the making of his will, and is not to be collected from subsequent accidents which the testator could not then foresee; and that when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die *immediately* nothing remains undisposed of, he cannot intend to give anything in these lands to the residuary devisee. This latter rule would govern all cases of lapsed devises; for if the testator were to die immediately upon the making of the will there would be nothing undisposed of, and the devisee would take; but if the devisee were to die between the making of the will, and the death of the testator, the devise would lapse and the heir-at-law would necessarily take in preference to the residuary devisee, for it was not undisposed of *at the making* of the will, but the devise was rendered inoperative by a subsequent accident — the death of the devisee. This is not so in the case of a void devise; for there at the making of the will nothing passes, nothing is disposed of, and the residuary devisee under the clause "all the residue of my estate" takes, and not the heir-at-law. In *Doe, Lessee of Stewart* v. *Sheffield*, 13 East, 526, this is considered as the settled law; and in *Doe on the demise of Wells and Others* v. *Scott and Another*, 3 Maule & Sel. 300, Lord Ellenborough in delivering the judgment of the court recognizes the authority of the two preceding cases as "admitted law" on the subject.

We are not unaware of the American decisions on this subject in 6 Conn. Rep. 292, and in *Lingan* v. *Carroll*, 3 Har. & McHen. 333; but we prefer following the authorities which we have cited. The heirs-at-law do not appear to have been objects of the testator's bounty; they are nowhere mentioned in her will. This circumstance

is not relied on in forming our judgment, but merely to show that the testatrix did not desire that her heirs-at-law should derive any benefit from her estate. Our decision is founded upon the authorities which we have cited, and upon the principles established by them. Our opinion is therefore for the residuary devisees, and judgment is accordingly given for the plaintiffs in the case of the *Lessee of McKnight and Others* v. *Hedges;* and in the other case, lessee of J. Ferguson and others, the heirs-at-law of Mary James, against the same defendant, that judgment be given for the defendant [1]

WORCESTER TRUST CO., Executor and Trustee, *v.* TURNER and Others.

210 Mass. 115. 1911.

Sheldon, J.[2] 1. It is rightly agreed by all parties that the legacies given by the eighth, ninth and seventeenth clauses of the will to Warren E. Sibley, Lydia Young and Victoria M. Worcester have lapsed; that to Mrs. Young because she was not a relation[3] of the testator within the meaning of R. L. c. 135, § 21;[4] *Esty* v. *Clark*, 101 Mass. 36; *Kimball* v. *Story*, 108 Mass. 382, 385; *Horton*

[1] And see *Hayden* v. *Stoughton*, 5 Pick. 528, 536, 537; Stat. 7 W. IV & 1 Viet. c. 26, § 25 (1837). *Greene* v. *Dennis*, 6 Conn. 292; *Lingan* v. *Carroll*, 3 H. & McH. 333; *Tongue* v. *Nutwell*, 13 Md. 415, 427, 428; *Van Kleeck* v. *Reformed Dutch Church*, 6 Paige 600, 20 Wend. 457; Alabama, Code (1907), § 6154, *contra*. Compare Statutes, *post*, note 4.

[2] The statement of facts and part of the opinion are omitted.

[3] Mrs. Young was a sister-in-law of the testator.

[4] There is legislation enacting that, if a devisee or legatee die after the will but before the testator, leaving issue surviving the testator, there is no lapse; but such issue takes the gift in the same manner that the devisee or legatee would have taken had he survived the testator. The statutes vary as to the deceased devisee or legatee, and slightly as to the estate his issue takes.

In the following jurisdictions the Statute applies to any devisee or legatee who predeceases the testator. District of Columbia, Code (1911), § 1631; Georgia, Annot. Code (1914), § 3906; Rhode Island, Gen. Laws (1909), c. 254, § 31; Tennessee, Code (1896), § 3928; Virginia, Annot. Code (1901), § 2523; West Virginia, Annot. Code (1906), § 3144. And see Iowa, Annot. Code (1897), § 3281; Maryland, Pub. Gen. Laws (1904), Art. 93, § 320; New Hampshire, Pub. Stats. (1901), c. 186, § 12.

In the following jurisdictions the Statute applies to a child or other relative of the testator. Alaska, Annot. Codes (1907), Part V, c. 15, § 145; California, Civ. Code (1915), § 1310; Idaho, Rev. Codes (1908), § 5747; Kansas, Gen. Stats. (1909), § 9832; Maine, Rev. Stats. (1903), c. 76, § 10; Massachusetts, Rev. Laws (1902), c. 135, § 21; Michigan, Stats. (1913), § 11001; Minnesota, Gen. Stats. (1913), § 7262; Missouri, Rev. Stats. (1909), § 546; Montana, Rev. Code (1907), § 4758; Nebraska, Rev. Stats. (1913), § 1314; Nevada, Rev. Code (1912), § 6219; North Dakota, Comp. Laws (1913), § 5679; Ohio, Annot. Code (1912), § 10581; Oklahoma, Rev. Laws (1910), § 8376; Oregon, Gen. Laws (1910), § 7327; South Dakota, Comp. Laws (1913), Civ. Code, § 1031; Vermont, Pub. Stats. (1906), § 2949; Washington, Gen. Stats. (1910), § 1328; Wisconsin, Stats. (1915), § 2289. See *Schaeffer* v. *Bernhardt*, 76 Ohio St. 443; 10 Am. & Eng. Ann. Cas. 920 note.

In the following the Statute applies to a child or other descendant of the testator. Alabama, Code (1907), § 6166; Arizona, Civ. Code (1913), § 1218; Arkansas, Dig.

v. *Earle*, 162 Mass. 448; *Curley* v. *Lynch*, 206 Mass. 289; and the others because neither of these two legatees left issue. *Frost* v. *Courtis*, 167 Mass. 251. The amounts of these legacies fall into the residue and become a part of the amount to be distributed under the fifth clause of the thirtieth article of the will. *Dresel* v. *King*, 198 Mass. 546.[1]

2. This fifth clause of the thirtieth article of the will is strictly residuary. It disposes of whatever residue may be left by ordering that "to be divided among the first sixteen legatees named" in the will, "in proportion to the several amounts given to each." This is a bequest as directly to those sixteen individuals and no others as if they were specified by name, instead of being identified by the order in which they are named in the will. It is not such a disposition as was made in cases relied on by some of the defendants in which beneficiaries were identified by description only and not by name, and, because a will speaks as of the time of the testator's death, it was held that those must take who answered to the description at that later time and not those who answered to it only at the time when the will was made. Or, more exactly, it is the first sixteen legatees who are named in the will, whether they actually take under it or not, who are described here and who really answer to the testator's description both at the time of his making his will and at that of his death.

It is also plain that these sixteen legatees take their shares of the residue severally, and not as a class. As in *Sias* v. *Chase*, 207 Mass. 372, 375, "they are relatives and friends of the testator, to all of whom legacies had been given in the earlier part of the will." As in *Sohier* v. *Inches*, 12 Gray, 385, the gift is to each one absolutely, and in legal effect is made to each by name (*Jones* v. *Crane*, 16 Gray, 308), and there are no words importing survivorship. A division is to be made in stated proportions among them, which of itself indicates that they are to take neither as joint tenants nor as members of a class, and that there is to be no increase by survivorship among them. *Frost* v. *Courtis*, 167 Mass. 251. *Lombard* v. *Boyden*, 5 Allen, 249. *Lyman* v. *Coolidge*, 176 Mass. 7. *Shattuck* v. *Wall*, 174 Mass. 167, 169. *Stanwood* v. *Stanwood*, 179 Mass. 223, 226. *Loomis* v. *Gorham*, 186 Mass. 444.

of Stats. (1904), § 8022; Colorado, Annot. Stats. (1912), § 7875; Illinois, Annot. Stats. (1913), § 4212; Indiana, Annot. Stats. (1914), § 3127; Mississippi, Code (1906), § 5081; New York, Consol. Laws (1909), Decedent Estate Law, § 29; North Carolina, Revisal (1908), § 3144; Texas, Civ. Stats. Annot. (1913), § 7869. And see Connecticut, Gen. Stats. (1902), § 296; New Jersey, Comp. Stats. (1910), p. 5866, § 22; Pennsylvania, Purdon's Dig. (1903), pp. 5142, 5143, §§ 21, 22; South Carolina, Code (1912), § 3574; Stat. 7 W. IV & 1 Vict., c. 26, § 33 (1837).

[1] *Matter of Hoffman*, 201 N. Y. 247; *In re Fassig's Estate*, 143 N. Y. Supp. 494, *accord*. And see *Allen* v. *Moore*, 98 Atl. (N. J.) 420; *Allison* v. *Allison*, 3 Jones Eq. 236; *Woodward* v. *Congdon*, 34 R. I. 316. *Dorsey* v. *Dodson*, 203 Ill. 32; *Crawford* v. *Cemetery Association*, 218 Ill. 399; *Dickinson* v. *Belden*, 268 Ill. 105; *Craighead* v. *Given*, 10 S. & R. 351, *contra*.

3. It follows from these considerations that each one of the residuary bequests to Mrs. Young, Sibley and Mrs. Worcester, lapsed like their general legacies. *Best* v. *Berry*, 189 Mass. 510, 512, and cases cited. The question arises how the amount of these bequests is now to be distributed. The general rule to be applied in such cases is well settled and is scarcely disputed. It was succinctly stated by LATHROP, J., in *Lyman* v. *Coolidge*, 176 Mass. 7, 9: "Where a legacy lapses which is part of the residue, it cannot, according to our decisions, fall into the residue because it is itself a part of the residue, and it must pass as intestate estate." In *Dresel* v. *King*, 198 Mass. 546, a case closely resembling in principle the one now before us, *Lyman* v. *Coolidge* was quoted with approval, and the same rule was applied. The same result has been reached in other cases, both here and elsewhere. *Hooper* v. *Hooper*, 9 Cush. 122. *Sohier* v. *Inches*, 12 Gray, 385, 387, in which this court said of such a bequest: "It certainly cannot fall into the residue, because it was itself a part of the residue. It must therefore pass to the heirs at law as undevised estate." *Jones* v. *Crane*, 16 Gray, 308. *Lombard* v. *Boyden*, 5 Allen, 249, 251, in which after a clear statement of the rule it is said that in such a case "the share of one who dies in the life of the testator . . . will pass to the next of kin, under the statute of distributions." *Frost* v. *Courtis*, 167 Mass. 251. *Powers* v. *Codwise*, 172 Mass. 425. *Colt* v. *Colt*, 33 Conn. 270. *Floyd* v. *Barker*, 1 Paige 480. *Craighead* v. *Given*, 10 S. & R. 351. *Crawford* v. *Mount Grove Cemetery Association*, 218 Ill. 399. *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503.

It may be granted, as was said in *Lombard* v. *Boyden*, 5 Allen, 249, and *Best* v. *Berry*, 189 Mass. 510, that this rule would not prevail against a manifest intention of the testator that such a lapsed residuary bequest, instead of being treated as intestate property, should go to increase the shares of other residuary legatees. But upon examination of this will in all its parts and consideration of the able arguments which have been addressed to us we have not been able to find the expression of such an intent in the language used. It is not enough that he had, as undoubtedly he did have, a general intent to dispose of all his property by his will. That was so in many of the cases already referred to. Such an intent was found by the court in *Dresel* v. *King*, 198 Mass. 546. In that case, as in this, the difficulty is that in the events which have happened he has made no disposition of the amount of these lapsed legacies; and the court cannot make one for him. *Sanger* v. *Bourke*, 209 Mass. 481, 486, 487. The case at bar differs from those which have been relied on in argument. In *Smith* v. *Haynes*, 202 Mass. 531, and *Swallow* v. *Swallow*, 166 Mass. 211, the bequests were to beneficiaries who were held to constitute a class, among the members of which there would of course be survivorship. Other cases turned upon the evident intent of the testator.

The pecuniary legacies given in the earlier part of the will to Lydia Young, Warren E. Sibley and Victoria M. Worcester fall into the residue; and the residue thus increased is to be divided among the first sixteen legatees named in the will as written, except that the shares of the residue which thus would come to these three deceased legatees are to be distributed as intestate estate to the next of kin of the testator. . . .

The decree of the Probate Court was correct, and a decree should now be entered in accordance therewith.

So ordered.[1]

VINER *v.* FRANCIS

2 Cox Ch. 190. 1789.

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington £6,000 in trust *for the use and benefit of his children,* to be equally divided between them, either in his lifetime or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby £3,000, the interest of which he gave to her for her own use during her life; and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, "*Item,* I give unto the *children of my late sister Mary Crowser,* the sum of £2,000 to be equally divided among them. Note, To the above three legacies I desire £100 may be paid to each within one month after my decease, to buy mourning, &c." And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: "I give unto my brother Samuel Wiggington one third of the residue, and one third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother Samuel Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser."

At the date of the will there were three children of Mary Crowser living, viz. John, Elizabeth, and William. William died *after the date of the will,* in *the lifetime of the testator;* and it was contended that one third of one third of the £2,000 given to the children of

[1] *Matter of Kunkler,* 163 Cal. 797; *Aiken* v. *Comstock,* 221 Mass. 444; *Matter of Hoffman,* 201 N. Y. 247; *Kent* v. *Kent,* 106 Va. 199; *Bagwell* v. *Dry,* 1 P. Wms. 700, *accord.* But see Ohio, Annot. Gen. Code (1910), § 10581; Rhode Island, Gen. Laws (1909), c. 254, § 7.

Compare *Gibbons* v. *Ward,* 115 Ark. 184; *Romjue* v. *Randolph,* 166 Mo. App. 87; *Beekman* v. *Bonsor,* 23 N. Y. 298, 312; *Prison Association* v. *Russell,* 103 Va. 563; *Lloyd* v. *Lloyd,* 4 Beav. 231; *Green* v. *Pertwee,* 5 Hare 249; *In re Jessop,* 11 Ir. Ch. 424; *Valdez's Trusts,* L. R. 40 Ch. D. 159; *In re Isaac,* [1905] 1 Ch. 427.

On the effect of the revocation by codicil of one of the shares of the residue, see *Waln's Estate; Vaux's Appeal,* 156 Pa. 194.

Mary Crowser lapsed into residue, and that one third of the residue lapsed, and was payable to the next of kin, as undisposed of.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once indeed thought that a bequest to "the children of A" might extend to *all* children born at any future time; but *Derisme* v. *Mello*, 1 Brown. Cha. Rep. 537, has settled that such children shall take, as are born at the time the distribution of the fund is to take place. The doubt in this case arises on the clause which gives "to the children of my late sister Mary Crowser" the sum of £2,000 to be equally divided. As I said before, the general rule as settled by *Derisme* v. *Mello*, is, that the children *living at the time of the distribution of the fund*, shall take; if it is to be distributed at the time of the testator's death, then such children as shall be *then* living; if distributable at the death of some *other* person, then the testator is to be supposed to mean such children as shall be living at the time of the death of such other person. Then the question is, whether a gift to the children of *his late sister* Mary Crowser is or is not indicative of an intention different from that which would be imputed to him under the general rule, that is, whether he meant the *particular* children living at the time he made his will, to take the fund equally between them, or whether it was not the same thing as if he had given the £2,000 "to the *three* children of my late sister;" for in that case it would have been a legacy to three *personæ designatæ*. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death. If so, why should I suppose that the *sister being dead*, he meant anything else than what would be imputed to him in the other case? This is not like the case of *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96, for there the gift is to the *five* grandchildren, which shows that he had *particular* objects in view. But the general rule, I take it, comes to this, to *exclude* all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator.[1]

[1] Compare *Morse* v. *Mason*, 11 Allen 36; *In re Barrett's Estate*, 116 N. Y. Supp. 756; *Matter of King*, 200 N. Y. 189; *Jones* v. *Hunt*, 96 Tenn. 369; *Dowset* v. *Sweet*, Ambl. 175.

On gifts to a class, see *Jackson* v. *Roberts*, 14 Gray 546; *Best* v. *Berry*, 189 Mass. 510; *Dildine* v. *Dildine*, 32 N. J. Eq. 78; *Moffett* v. *Elmendorf*, 152 N. Y. 475; *Chase* v. *Peckham*, 17 R. I. 385; *Kent* v. *Kent*, 106 Va. 199; *Dimond* v. *Bostock*, L. R. 10 Ch. 358; *In re Jackson*, 25 Ch. D. 162; *Re Allen*, 44 L. T. N. S. 240; 21 Am. & Eng. Ann. Cas. 415 note; 34 L. R. A. N. S. 945 note.

SECTION II.

ADEMPTION AND SATISFACTION OF DEVISES AND LEGACIES.[1]

AMETRANO, INDIVIDUALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED, APPELLANT *v.* DOWNS ET AL., RESPONDENTS.

170 N. Y. 388. 1902.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 12, 1901, affirming a judgment of the Special Term construing the will of Margaret Shelley, deceased.

The facts, so far as material, are stated in the opinion.

CULLEN, J. On August 7th, 1884, Margaret Shelley, now deceased received by conveyance from her husband through an intermediary an undivided one-half in the premises known as number 22 Oliver street, in the city of New York. On March 12th, 1891, she executed the following will:

"I, Margaret Shelley, of the City, County and State of New York, being of sound disposing mind and memory, do hereby make, publish and declare this to be my last will and testament.

"*First.* I order and direct my funeral expenses to be paid as soon as shall be convenient after my decease.

"*Second.* I give, devise and bequeath my one-half interest in the building known as number twenty-two (22) Oliver street, in the Fourth Ward of the City of New York, unto my daughter Lizzie, wife of Emanuel Amotrono, of the City of Brooklyn, County of Kings, State of New York, and to her heirs and assigns forever.

"I nominate, constitute and appoint Patrick J. Murphy, of the City of New York, and Charles Henry Hawkins, of the same place, or either of them, as executor of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-one."

In 1896 condemnation proceedings were taken by the city of New York, to acquire said number 22 Oliver street as a site for the erection of a school house. To these proceedings Margaret Shelley was not made a party. The net amount of the award after the satisfaction of the incumbrances on the property, amounting to $9,800, was in February, 1897, paid to her husband, Michael Shelley, who thereupon deposited one half of the award, $4,900, in the Washington Trust Company to the credit of his wife as her share of the property. In 1898 Margaret Shelley drew the accrued interest on the deposit

[1] Compare 40 L. R. A. N. S. 542 note.

and $400 on account of the principal. She died in February, 1899, leaving an estate consisting entirely of personalty. The plaintiff is the devisee named in the will as well as the administrator of the estate of the deceased, and in this action which is for a settlement of her accounts, claims that she is entitled under the will to the fund received by the testator in the condemnation. She has been defeated in this claim by both the courts below and now appeals to this court.

The able opinion of the learned Appellate Division deals so fully with the question in dispute that there remains but little to be added by us. Had the deceased voluntarily alienated her property by deed it is entirely clear, under the authorities in this state, that the devisee would have no claim to the proceeds of the sale. (*Adams* v. *Winne*, 7 Paige, 97; *Beck* v. *McGillis*, 9 Barb. 35; *Gilbert* v. *Gilbert*, Id. 532; *Vandemark* v. *Vandemark*, 26 Id. 416; *Philson* v. *Moore*, 23 Hun, 152; *McNaughton* v. *McNaughton*, 34 N. Y. 201.) "If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised." In *Adams* v. *Winne* (*supra*) and *Beck* v. *McGillis* (*supra*) the testator had taken back a mortgage on the devised land as security for the purchase money, yet it was held that the devisee was not entitled to the mortgage. The only point to be considered therefore, is whether a different rule obtains in the case of involuntary alienation, by operation of law, from that which prevails on a voluntary sale. Mr. Jarman asserts that the rule is the same in both cases, and the English decisions cited by him sustain the doctrine of the text. (Jarman on Wills, p. 163.)

We see no such difference between a voluntary and an involuntary sale of the devised land as justifies a distinction in principle in the application of the rule that where the testator has parted with the subject of the devise, all claim of the devisee is lost. While there is no authority on the point in this state (there is said to be none in the country), the question presented is not without analogy in the rule which determines in cases of intestacy the character of the proceeds of sales by operation of law, whether they are to be considered as real or personal property. 'It is settled by a number of authorities that if the sale be made by execution or judicial decree in the lifetime of the intestate the proceeds are personalty and go to the next of kin, while if made after his death they are real estate and go to the heirs at law (*Graham* v. *Dickinson*, 3 Barb. Ch. 169; *Denham* v. *Cornell*, 67 N. Y. 556), except where the property belongs to an infant or to an incompetent person, in which case the proceeds retain their original character of realty. (*Sweezy* v. *Thayer*, 1 Duer, 286; *Horton* v. *McCoy*, 47 N. Y. 21.)

It is urged by the learned counsel for the appellant that the condemnation proceedings did not effect the revocation of the will,

because there was no "other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed" (2 R. S. 64, § 42), nor any settlement, deed or other act by the testator (§47). It may be conceded that there was no revocation of Mrs. Shelley's will, though I very much doubt whether the deceased was not divested of title by her own voluntary act. As she was not a party to the condemnation proceedings they were without force or effect as to her. If she lost her title it was because, by her voluntary acceptance of the award, she estopped herself from claiming the property. Be this as it may, the case does not fall within the Statute of Wills. A specific devise or specific legacy may not be revoked, but unless the property devised or the thing bequeathed is found in the estate of the testator at the time of his decease the will is, necessarily, inoperative. The testatrix could not devise to the appellant an undivided half of the premises number 22 Oliver street, for she did not own it at her decease, and the question here presented is not whether the devisee shall receive the property devised, but whether she shall receive the fund which proceeded from the condemnation of that property. With this latter question the Statute of Wills does not deal. It does not provide affirmatively that a conveyance or other disposition of bequeathed or devised property shall render the will in that respect ineffective; it assumes that principle, and in sections 45, 46 and 47 merely limits the operation of the rule by providing that in three cases, to wit, an executory contract, an incumbrance or mortgage and a conveyance or deed altering the testator's estate, but not wholly divesting his title, the devise shall be revoked only *pro tanto*. As said by the chancellor in *Adams* v. *Winne* (*supra*) it left unchanged the existing law "that when the testator had converted real estate, which he had devised as such, into personalty, or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of the will or an ademption of the bequest." The correctness of this doctrine has never been challenged.

The judgment appealed from should be affirmed, with costs to both parties payable out of the estate.

BARTLETT, MARTIN, VANN and WERNER, JJ., concur; PARKER, Ch. J., and HAIGHT, J., take no part.

Judgment affirmed.[1]

[1] Compare *Walton* v. *Walton*, 7 Johns Ch. 258; *Earl of Lincoln's Case*, Freem. C. C. 202; *Perkins* v. *Walker*, 1 Vern. 97; *Luther* v. *Kidby*, 3 P. Wms. 169 note. See 1 Jarman, Wills (6th Am. ed.),* p. 128 and note.

As to the effect of a contract by the testator to sell land devised, see 1 Ames, Cas. in Equity Jurisdiction, p. 195 and note; 1 Woerner, Am. Law Adm. (2d ed.), § 53.

PARTRIDGE *v.* PARTRIDGE.

Cas. temp. Talb. 226. 1736.

THE testator by his will devised £1,000 capital South Sea stock to his wife for life, for her sole use and benefit, with power to dispose of the same to such of her children as she should think fit. At the time of making his will he was possessed of £1,800 South Sea stock: he afterwards reduced such stock to £200, but after that purchased as much as made up the £200 to be £1,600, and afterwards died in July, 1733. In June next before his death the Act took place for changing three fourths of the capital South Sea stock into annuities. The questions made upon this case were, first, whether the testator selling £1,000 part of his £1,800 South Sea stock, after the making his will, should not be considered as an ademption of the legacy. If not, secondly, if the Act for turning South Sea stock into annuities should not be so considered. In the argument of this case the case of *Ashton and Ashton*, Cas. temp. Talb. 152; 3 P. Will. 384, was cited, where the testator devised £6,000 South Sea stock to J. C., and at the time of his death and will was possessed of only £5,500 South Sea stock; upon which a bill was brought against the executor to have it made up £6,000. But the Master of the Rolls, and after him the Lord Chancellor, on appeal, were of opinion the deficiency should not be supplied, upon this principle, that, as general legatees have no lien on what is given to specific legatees, so a specific legatee shall have no lien on the general fund of the testator; but if any loss happens to what is specifically given to him, he must bear the burden thereof himself.

LORD CHANCELLOR [TALBOT]. All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much particular stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in the case at bar, to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again. As to the second point, after such devise, the Legislature thought proper to make a law to change three fourths of the stock into annuities, and the fourth to remain as it stood before; so that the testator, when he died, was possessed of £1,200

annuities, and £400 stock; and it would be extremely hard to say, that this alteration of the stock by Parliament should work an ademption, when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do.

If an obligee was to devise a legacy of £1,000 secured by bond from A. B., and he should afterwards compel A. B. by due course of law to pay it him, this would be an ademption of the legacy; but it was never thought, if A. B. should pay in the money voluntarily, it would be an ademption, because the obligee is bound to receive it.

TRUSTEES OF THE UNITARIAN SOCIETY IN HARVARD *v.* TUFTS.

151 Mass. 76. 1890.

HOLMES, J.[1] We must hold the legacy in the fourth clause of the will specific, although we cannot but fear that, if the testatrix had been fully advised of the consequences of making a legacy specific, she would have changed her will.

The legacy is of "ten shares of the stock of the Worcester and Nashua Railroad Company." By the fifth clause of the will, the testatrix gives ten shares to another legatee, and she gives none of it to any one else. At the time of making her will, she owned twenty shares of the stock. We will assume, for the purposes of our decision, that the mere coincidence between the amount given and the amount owned would not make the legacy specific, both being round numbers. See *Tifft* v. *Porter*, 8 N. Y. 516; *Bronsdon* v. *Winter*, 1 Ambl. 57; *Purse* v. *Snaplin*, 1 Atk. 414; *Robinson* v. *Addison*, 2 Beav. 515, 520. This might be admitted, perhaps, without at all questioning *White* v. *Winchester*, 6 Pick. 48. But *White* v. *Winchester*, and *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 373, show that such a coincidence is an important fact to be considered in connection with the language of the will. See *Johnson* v. *Goss*, 128 Mass. 433, 436.

Turning to the language, we find nothing conclusive in the fourth clause. The word "the" preceding "stock" is ambiguous, and may as well refer to the stock of the company in general as to the stock owned by the testatrix. But if "my" were used instead of "the," the legacy would be specific. *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 373. *Foote, appellant*, 22 Pick. 299, 303. See *Johnson* v. *Goss*, 128 Mass. 433, 435. The same principle applies, upon equally strong grounds, when a testator, after giving legacies of stock generally, gives the rest of the stock "standing in my name." *Sleech* v. *Thorington*, 2 Ves. Sen. 560. See *Metcalf* v. *Framingham Parish*.

[1] The statement of facts is omitted.

128 Mass. 370, 372; *Millard* v. *Bailey*, L. R. 1 Eq. 378; Theobald on Wills, (3d ed.) 100. In this case the eighth clause of the will gives "the balance of my stock, as per my stock-book, my furniture, and all other property not otherwise disposed of by me." This language, taken with the facts, makes it pretty plain that the stock disposed of by the testatrix in the fourth clause was stock then belonging to her; and the conclusion is fortified by the other clauses, which show that the general course which she adopted in making her will was to take up different items of her property as it then stood, and to dispose of them. The words used describe a specific legacy too clearly to be controlled by the fact that the proviso discloses a motive which might be conjectured to be independent of the form in which the property was invested.

The republication of the will by the codicil does not change or enlarge the meaning of the words of the will, on which the plaintiff must rely in order to recover the legacy. It follows that the legacy was adeemed by the sale of the stock. *Pattison* v. *Pattison*, 1 Myl. & K. 12. *Macdonald* v. *Irvine*, 8 Ch. D. 101, 108. See *Sidney* v. *Sidney*, L. R. 17 Eq. 65, 68.

Judgment for the defendant.[1]

WYCKOFF *v.* EXECUTORS OF PERRINE.

37 N. J. Eq. 118. 1883.

On demurrer to bill.

VAN FLEET, V. C.

This is a suit for a legacy. The defendants have demurred to the complainant's bill, denying that on the case made by it she is entitled to relief. The complainant is a daughter of Matthias M. Perrine, who died testate in the month of October, 1878. She grounds her right of action on the following clause of her father's will:

"Whereas, my son-in-law, David B. Wyckoff, borrowed of me the sum of twenty-three hundred dollars, which sum I loaned him on interest; now, it is my will, in order to do equal justice to and between my children, that the same shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate; and I give and bequeath to my said daughter Elizabeth the further sum of five hundred dollars, which is to be in full of her share of my estate; and I make no further provisions for the said Elizabeth Wyckoff in this my last will and testament."

[1] Compare *Lyons* v. *Lyons*, 224 F. R. 772; *New Albany Trust Co.* v. *Powell*, 29 Ind. App. 494; *Palmer* v. *Palmer*, 106 Me. 25; *Spinney* v. *Eaton*, 87 Atl. (Me.) 378; *Slade* v. *Talbot*, 182 Mass. 256; *In re Largue's Estate*, 183 S. W. (Mo.) 608; *Moon's Estate*, 49 Oreg. 286; *Snyder's Estate*, 217 Pa. 71; *Mahoney* v. *Holt*, 19 R. I. 660; *Ashton* v. *Ashton*, 3 P. Wms. 384; *Avelyn* v. *Ward*, 1 Ves. Sr. 420; *Purse* v. *Snaplin*, 1 Atk. 414; *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Gordon* v. *Duff*, 3 De G. F. & J. 662. Many cases on bequests of stock may be found cited in 14 Col. Law Rev. 74; 11 L. R. A. N. S. 49 note.

The $500 have been paid. The debt of David B. Wyckoff to the testator was evidenced by a promissory note, dated April 1st, 1874, and payable one year after date. A petition in bankruptcy was filed against Wyckoff on the 3d day of May, 1876, on which he was subsequently, in the language of the bill, in due course of law adjudged a bankrupt. He was discharged on the 2d of April, 1878. The testator proved his debt and received two dividends out of the bankrupt assets — the first, June 15th, 1877, of $384.50, and the second, March 14th, 1878, of $123.62, making a total of $508.12. The will bears date May 28th, 1877. It was executed, it will be observed, more than a year after the commencement of the proceedings in bankruptcy, and less than three weeks before the testator received the first dividend.

The complainant contends that the legacy given by the clause under consideration is not specific but demonstrative, in other words, properly construed the clause means this, that she is, under any circumstances, to have a legacy of $2,300, the reference to the debt of her husband being intended simply to indicate the fund which should be applied primarily to its payment. Such a construction would, I think, not only do violence to the language used by the testator, but would attribute to him a purpose certainly not expressed, and probably never entertained. No gift is made by express words, but an intention to give is very clearly expressed by words of direction or command. There can be no doubt that the thing which was before the testator's mind, when he made his will, as the subject of the gift to the complainant, was a debt. He tells who the debtor was — his son-in-law, David Wyckoff; how he incurred the debt — for borrowed money; the amount of the debt — $2,300; the terms on which it was held — loaned on interest; and then he says:

"Now, it is my will, in order to do equal justice to and between my children, *that the same* — that is, the debt due to me from my son-in-law — shall be considered and taken as so much of the share of his wife, Elizabeth, of my estate."

In construing a will the court must always have regard to the circumstances, situation and surroundings of the testator. At the time this will was made the son-in-law had been adjudged a bankrupt; the testator knew it, he knew also that the greater part of his debt was hopelessly lost, and for that reason, unquestionably, he thought it was his duty, in order that justice might be done to all his children, to treat the debt of his son-in-law as an advancement to his daughter, and to effect that purpose he gave her the debt. He intended to say by the provision under consideration, as I think he has quite clearly said:

"I want each of my children to have an equal share of my estate; the husband of my daughter Elizabeth borrowed of me, some time ago, $2,300, which he cannot repay; in order to be just to my other children, I give Elizabeth the debt I hold against her husband, as

part of her share, and the further sum of $500, but she is to have nothing more."

In deciding whether a legacy is specific or general, the intention of the testator must control, as it must the decision of every other question involving the construction of wills. There is no technical arbitrary rule requiring the use of particular words or expressions to make a bequest specific. Such intention may be manifested either by clear words or by the general scope and texture of the instrument, but in the latter case, in the language of Lord Eldon, the inference should rest upon a strong, solid and rational interpretation of the will. The rule of construction to be observed in such cases is thus stated by Roper: "A court of equity leans to the consideration that all bequests are general; it therefore requires expressions actually bequeathing the identical debt, or such reference to it, appearing upon a strong, solid and rational interpretation of the will, as to raise a plain inference that the debt was the exclusive subject intended to be given by the testator to the legatee." 1 Roper on Leg. 234. In *Norris* v. *Thomson*, 1 C. E. Gr. 218, Chancellor Green held that in order to make a legacy specific there must be something on the face of the will to individuate the thing given, or some form of expression must be used which clearly indicates a purpose on the part of the testator to give a specific thing and nothing else.[1] Here, just such a condition of affairs exists. The testator has marked out, with great clearness and precision, just what the complainant is to take — she is to have the debt of her husband and $500; and then he declares she is to have nothing more. That such was his intention, seems to me to be so obvious as to leave the complainant without any substantial ground upon which to rest the opposite contention. The words of exclusion must, I think, be regarded as furnishing an almost infallible test of the meaning of the testator.

The case involves another question. Has the legacy been adeemed? It is certain the debt which was the subject of the legacy, did not exist at the time of the testator's death. So much of it as had not been paid to the testator, out of the bankrupt's assets, was extinguished by his discharge in bankruptcy, so that the subject of the gift did not exist at the testator's death. Some of the earlier decisions made a distinction between the effect of a voluntary payment and a compulsory payment of a debt, which was the subject of a specific legacy, in adeeming the legacy. They held that, where the debtor came forward of his own volition and without solicitation, and paid the debt, in the testator's lifetime, the testator's acceptance of the money, under such circumstances, did not indicate an intention to take back the legacy; but if he, of his own will, and in the absence of any other apparent reason than that he wanted the debt

[1] On the admissibility of parol evidence to determine whether a legacy is general or specific, see *Norris* v. *Thomson*, 16 N. J. Eq. 218, 222; *Estate of Stewart*, 15 N. Y. State Rep. 420.

paid, constrained the debtor to pay, then his act was regarded as evincing an intention to adeem the legacy. This distinction was recognized by the supreme court in *Stout* v. *Hart*, 2 Hal. 414, 424. It was there said: "A voluntary payment is not an ademption, because accepting the money when tendered does not imply any alteration in the intentions of the testator; but when the testator compels payment, this fact may or may not amount to an ademption, according to circumstances." The cases adopting this distinction as the rule of judgment, will be found collected in 2 Lead. Cas. in Eq. (4th Am. ed.) 624. The distinction, however, no longer prevails. The modern decisions, both of this country and England, with almost perfect unanimity, repudiate it as unsound and fallacious. The rule now generally recognized as an accurate statement of the law on this subject, is that laid down by Lord Thurlow in *Humphreys* v. *Humphreys*, 2 Cox Ch. 185. He said: "The only rule to be adhered to is to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." Chief-Justice Black states the same rule, as follows: "If a thing bequeathed in a will, by such description as to distinguish it from all other things, be disposed of, so that it does not remain at the testator's death, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him, but if not, he cannot have money in the place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator." *Hoke* v. *Herman*, 21 Pa. St. 301, 305. The cases repudiating the distinction alluded to are too numerous to be cited. They will be found referred to in 2 Wms. on Exrs. (6th Am. ed.) 1323; 2 Lead. Cas. in Eq. (4th Am. ed.) 623, 668; Theo. on Wills 121; Redf. on Wills. 423. The question now is one of identity and not of intention, as gathered from matters extrinsic the will. In such cases, the test is, did the subject of the gift exist in specie at the testator's death; if it did, the legatee is entitled to it against all persons except creditors; if it did not, he is not.

Trying the complainant's right to relief by this principle, it is clear that judgment must be awarded against her. The demurrer must be sustained, with costs.[1]

[1] Compare *Nusly* v. *Curtis*, 36 Colo. 464; *Ford* v. *Ford*, 23 N. H. 212; *In Re Tillinghast*, 23 R. I. 121, *post*, p. 348; *Rogers* v. *Rogers*, 67 S. C. 168; *Stanley* v. *Potter*, 2 Cox Ch. 180; *Fryer* v. *Morris*, 9 Ves. Jr. 360; *In re Bridle*, 4 C. P. D. 336.

In re PEIRCE.

25 R. I. 34. 1903.

Case stated for the construction of a will.

Per Curiam. The court is of opinion that the stock in the United National Bank goes to William C. Baker, trustee under the bequest of the stock in the Rhode Island National Bank.

There was no ademption of the legacy of the stock in the Rhode Island National Bank, because, though in form a sale, the stock was not in fact sold but exchanged.

In *Soule for an opinion*, Prov. Co. Eq. No. 5,861, it was held that stock in the Manufacturers' Trust Co. passed under a legacy of stock in the Manufacturers' National Bank, for which it had been given in exchange, under a reorganization and a new charter. In that case one bank reorganized, and in this case four banks reorganized and consolidated. There is no essential difference in the cases. The fact of an exchange rather than a sale is evidenced by the terms of the offer, by which stockholders of each bank were *entitled* to stock in the new company by way of exchange. The units of value were different; still it was an exchange. Stockholders of the four banks had their rights to the new stock, by virtue of ownership of the old stock. All the assets and liabilities of the four banks passed to the new corporation. Neither bank was wound up in the ordinary form, but its assets were to be liquidated by the United National Bank. The owners of stock in the Rhode Island National Bank were to have an additional amount over the nominal price at which their stock was taken, according to the liquidation of its assets, a fact which traces the ownership of stock into the new corporation. The offer made to stockholders of the four banks was to substitute their ownership of stock in those banks, according to its value, for stock in the new bank, or to sell it for cash. The testatrix in this case chose the former. The transfer of stock under such circumstances cannot be treated as a sale, unless it was done under an acceptance of the cash offer therefor.

The small payment in cash, to equalize values between the several banks, did not change the character of the transaction.[1]

[1] Compare *Walton* v. *Walton*, 7 Johns. Ch. 258; *Oakes* v. *Oakes*, 9 Hare 666; *In re Lane*, 14 Ch. D. 856; *In re Slater*, [1907] 1 Ch. 665; *In re Gillins*, [1909] 1 Ch. 345; *In re Clifford*, [1912] 1 Ch. 29; *In re Leeming*, [1912] 1 Ch. 828.

JOHNSON, EXECUTOR *v.* CONOVER.

54 N. J. Eq. 333. 1896.

REED, V. C.[1]

This bill, although filed in the nature of a bill of interpleader, is in reality a bill by an executor to obtain a decree construing the will of his testator.

The first question propounded is whether the bequest to testator's wife of "the sum of eight thousand dollars, invested in stocks, the interest thereof to be paid to her during life," is a specific or a demonstrative legacy.

The second question is whether, if it be a general legacy, it is chargeable upon the real estate of the testator.

The facts of the case are these: Peter P. Conover died November 15th, 1890. By his will, after directing his debts and funeral expenses to be paid, he proceeded as follows: . . .

"*Item.* I give and bequeath unto my beloved wife, Margaret, the sum of eight thousand dollars, invested in stocks, the interest whereof to be paid to her during life. . . .

"*Item.* I hereby empower my wife, if she so elect, to devise the sum of eight thousand dollars, the interest whereof I have before directed to be paid to her."

The widow, Margaret Conover, died October 1st, 1893. She left a will . . . [in which she exercised the power of appointment as follows: — Ed.]

. . . "I give, bequeath and devise the same unto my daughter, Miss Huldah Conover, and in case of the death of my said daughter before me, I do in that event give, bequeath and devise said sum of eight thousand dollars in equal shares to my two sons, William L. and Elias H. Conover. And I do hereby empower and direct the surviving executor or the legal personal representative of my said husband to pay over and dispose of said sum of eight thousand dollars to the persons to whom I have given, bequeathed and devised the same as aforesaid."

She appointed Alfred Walling as her executor.

The will of Peter P. Conover, already mentioned, was executed June 6th, 1878. At that time he seems to have had money invested in stocks. He had fifty shares of Pittsburg, Fort Wayne and Chicago preferred stock of the par value of $100 per share. For this stock he had paid $4,500 in 1868 or 1869, but at the time of the execution of the will it was worth, in the market, $5,000.

He also had at this time, three seven-per-cent. bonds of the Cincinnati, Richmond and Fort Wayne railroad, par value $1,000 each;

[1] The statement of facts in the opinion is abbreviated and other parts of the opinion are omitted.

the market value, in 1878, of this was $700 per share. It is probable, but not certain, that he had no other stocks.

Whether he had any personal property aside from this stock and these bonds, in 1878, does not appear in the testimony. It does appear that, at the time of his death, his personal estate did not amount to $8,000. He died seized of real estate worth upwards of $15,000, all of which he had owned from the time of the execution of his will. The value of his real estate at the time he made his will is estimated at $25,000 to $30,000.

Testator sold the fifty shares of railroad stocks, in May, 1888, for $7,000. . . .

The first question, as already observed, is whether the bequest of the $8,000, contained in the third clause of Peter P. Conover's will, is a specific or a demonstrative legacy. The importance of this question arises out of the fact that the testator during his life converted the stocks mentioned in that clause, so that at his death they were non-existent as a part of his estate.

One of the attributes of a specific, as distinguished from a general legacy, or from a demonstrative legacy, is that if the property given *in specie* does not exist at the death of the testator, there is nothing upon which the gift can take effect, and the legacy is necessarily lost.

A general legacy is payable out of any personalty, or, if properly charged, out of the real estate of the deceased. In this respect a demonstrative legacy has the quality of a general legacy. It differs from a specific legacy in this respect, that the former bequeaths certain property *in specie*, while the latter gives generally a sum of money to be primarily raised out of certain specified property.

If there is none of the property existing out of which it is to be raised, it becomes a general legacy, payable out of the general estate. If a part of the property is existing, but such part is insufficient to pay all of the demonstrative legacy, the remainder becomes a general legacy. So it is never adeemed by the non-existence of the specific property out of which it is directed to be raised.

If, therefore, the gift in question is demonstrative, *i. e.* of a sum of $1,000 to be raised out of stocks, then the stocks not being in existence at the time of Conover's death, it is a general legacy, payable out of his estate as such. If, however, the gift was of the stock *in specie*, nothing passed to his widow for her disposition by will. On account of this liability to extinguishment, contrary to the intention of the testator, by the destruction or conversion of the property specifically given, the tendency of courts is to lean towards such a construction of the will as will make the bequest general or demonstrative rather than specific. *Norris et al.* v. *Executors of Thompson et al.*, 1 C. E. Gr. 218.

The language employed by the testator, in making the bequest now in question, brings it within a much-discussed class of cases. Of all the nice distinctions which have been drawn in arriving at

testamentary intent, there are none finer than those which have been evolved by cases of gifts of money or of a sum of money, coupled with the words "invested in securities," or "in stocks," or "in shares," or "in bonds."

Slight indications in other parts of the will are relied upon to discover whether, by the use of such language, the testator meant to give the stocks, or securities, or bonds, or shares *in specie*, or whether he merely meant to give a sum of money which happened to be invested in such stocks or bonds, or was to be so invested, and so meant to indicate that the sum of money given was to be paid out of such securities. Perhaps the most cited case in the English court of chancery, is *Mytton* v. *Mytton*, L. R. 19 Eq. Cas. 30. A testatrix, having £3,000 East India debenture bonds, gave a legacy to her executors, in trust, to pay to her nephew, "the sum of £3,000 invested in Indian securities." Vice-Chancellor Malins held this to be a demonstrative and not a specific legacy. In the subsequent case of *Page* v. *Young*, L. R. 19 Eq. Cas. 501, there was a bequest to "my dear sister" of the interest of £4,500 in the funds for her absolute use and benefit. This bequest was followed by specific gifts to the same legatee, then followed the words "at her death to M. A. H., the funded property to H. Y." The same vice-chancellor who had decided *Mytton* v. *Mytton* held that this bequest was specific, because, looking at the situation of the testatrix, he was of the opinion that she intended to mean "my money that is now in the funds."

The last reported case decided by the English equity courts, of which I am informed, is that of *Pratt* v. *Pratt*, L. R. Ch. 491 (1894). The bequest in this case was of £800, invested in two and a half consols. Judge North, after a review of many cases, held that this was a specific bequest of the consols. He admits that the only point of difference between this bequest and the one in *Mytton* v. *Mytton*, *supra*, consists in the fact that in the former the testator gives "the sum of £3,000," while in the latter he gives, not the sum of, but simply £800. He seems to think that there is a distinction between the gift of "the sum of £—— invested in securities" and of "£—— invested in securities."

In *Giddings' Executors* v. *Steward et ux.*, 16 N. Y. 365, the bequest was "of the sum of $1,200 and interest on the same contained in a bond and mortgage." There was a subsequent provision that the sum was given to the legatee for life, with a limitation over. The New York court of appeals held this to be a demonstrative legacy. Judge Selden says: "The form of expression is not one that would naturally be chosen to manifest an intention to make a specific bequest of the bond and mortgage itself. The leading subject of the gift is not the bond and mortgage, but the sum of money mentioned."

Little assistance in arriving at testamentary intention in this respect is to be obtained from an examination of the cases in detail. Such an examination would show that, in determining whether, by

the use of this formula, the testator means to give the sum of money or to give the specific stock or share or bond in which it is invested, every expression in the will is scanned to arrive at the intention of the testator. When there cannot be found any particular language which can be pressed into use for this purpose, then the courts seem to go upon the ground that the testator is presumed to have intended to make a sensible and equitable disposition of his property, and if the bequest is to a person so related to the testator that the ademption of the gift could not have been anticipated by the testator, then the bequest will be held to be general, to save it from extinction. This seems to have been the ground upon which *Mytton* v. *Mytton*, *supra*, and *Page* v. *Young*, *supra*, were decided.

If, in the present case, there were no testimony exhibiting the character of the property owned by the testator at the date of the execution of his will, I think it would be clearly inferable that the testator, in using the quoted language, meant $8,000 which was to be invested in stocks. This would undoubtedly fix upon the gift the character of a general and not of a specific legacy. The fact disclosed in the testimony upon which an argument in favor of regarding it as a specific gift of the stocks, is that it seems almost certain that, at the time of executing the will, the testator held stock and bonds of the nominal value of $8,000; therefore, it can be argued, he must have meant to give the sum of $8,000 then invested in stock. If he had used the form of expression, "now invested in stocks," it would, according to Vice-Chancellor Malins, in *Page* v. *Young*, have implied a specific bequest. In *Robinson* v. *Addison*, 2 Beav. 515, however, the testator owned fifteen and a half shares of the Leeds and Liverpool Canal Company. He gave in trust to one legatee five and a half shares in the Leeds and Liverpool Canal Company, to another five shares, and to still another five shares. The bequest, it is perceived, was of the exact number of shares owned by the testator at the time of the execution of the will, and yet it was held to be a general legacy. The master of the rolls remarked, "there is no description or reference to show that he meant the particular shares which he had at the date of the will."

Looking at the form of words employed in making the present bequest and at the whole face of the will, it is difficult to say whether the testator meant to give absolutely the sum of $8,000 or to give the stocks and bonds of the nominal value of $8,000. It is to be remarked, however, that if he had intended to make a specific gift of the stock and the bonds, it would have been easy for him to have given them by name. But, by employing the words "the sum of $8,000," in the first clause, and by repeating it in the succeeding clause, he has left it doubtful whether his intention was not to give the sum of $8,000, which happened at that time to be invested in what he termed "stocks." It is probable that he had no notion that, in case of the fluctuation in the value of stocks, or from any

reason, it should become politic to change these securities, the gift would thereby become extinguished. I shall therefore lean towards that construction which prevents ademption, and hold this to be a demonstrative legacy.[1] . . .

IN RE TILLINGHAST, EXECUTOR.

23 R. I. 121. 1901.

PETITION for construction of a will. The facts are fully stated in the opinion.

BLODGETT, J. Upon the agreed statement of facts three questions arise under the fifth clause of the will of Ellen M. Perry, late of Bristol, deceased, concerning the disposition of the sum of $8,259.07, the cash balance now in the hands of the executor. The clause in question is as follows:

"Fifth. Whereas I am or may be entitled to a certain interest in the estate of my mother, Ellen M. Dabney, deceased, which is now in the hands of the Fidelity Insurance, Trust, and Safe Deposit Company, Now I give, devise, and bequeath the same to the Fidelity Insurance, Trust, and Safe Deposit Company, in trust, to keep the same invested, and to pay the net income thereof to my husband, Raymond H. Perry, for the term of his natural life, and upon his death then to pay the income thereof to his daughter, Frances Raymond Perry, for the term of her natural life, and upon her death then to hold the said estate in trust upon the same terms of trust as are above provided for in the fourth item hereof for the estate over which I have a power of appointment under the will of my said father, Charles H. Dabney."

These questions are:

1. Does the language of said fifth clause constitute a specific legacy?
2. If so, has such legacy been in whole or in part adeemed?
3. Does the share of Mrs. Perry in the estate of her sister, Frances E. Rhett, come within the provisions of said fifth clause of the will of Ellen M. Dabney?

1. We are of the opinion that the bequest under consideration is a specific bequest. The language used is substantially similar to the language used by the court in *Dean* v. *Rounds*, 18 R. I. 437, as constituting a specific bequest. It absolutely appropriates a fund clearly defined, and for a long time invested in certain securities easily capable of identification, but whose exact cash value was not known, to one definite object. It was, therefore, an appropriation of the fund itself, rather than an attempt to measure the gift by the amount of an uncertain sum. *Towle* v. *Swasey*, 106 Mass. p. 106; *Bethune*

[1] Affirmed in 55 N. J. Eq. 592. Compare *Gelbach* v. *Shively*, 67 Md. 498, *post*, p. 736; *Blair* v. *Scribner*, 67 N. J. Eq. 583; *Allen* v. *Allen*, 74 Atl. Rep. (N. J.) 274.

v. *Kennedy*, 1 Myl. & Cr. 114; *Stephenson* v. *Dowson*, 3 Beav. p. 349; *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 37.

2. The will of Ellen M. Perry was executed on July 28, 1898, and she died on May 28, 1899. On May 11, 1899, she executed the following receipt to the trustee under Mrs. Dabney's will, as follows:

"Received of the Fidelity Insurance, Trust, and Safe Deposit Company, trustee, the sum of eleven thousand five hundred and fifty-eight and 92/100 dollars in kind as set forth in the schedule hereunto annexed, the same being in full of principal and income awarded to me as per the adjudication filed in the Orphans' Court, December 30th, 1898, upon the account of the said The Fidelity Insurance and Safe Deposit Company, trustee, as aforesaid.

"(Signed) Ellen M. Perry.

"Witnesses at signing,
"Nellie D'Wolfe Archer,
"Abram O. Powell."

It is agreed that all the securities therein referred to were then delivered to Mrs. Perry, except the two mortgages on property in Philadelphia, which were duly assigned to her by the trust company, but which she directed the trust company to retain in its possession and to proceed to collect for her account. It is conceded, too, that with the exception of these mortgages all the securities enumerated in this schedule were converted by Mrs. Perry to her own uses in her lifetime. We are consequently of the opinion that the legacy was thereby *pro tanto* adeemed, since the specific items of the bequest no longer exist.

In *Kennedy* v. *Sinnott*, 179 U. S. 606, decided in 1900, Chief Justice Fuller says (p. 617): "The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed and the intention that the legacy should fail is presumed."

In *Tomlinson* v. *Bury*, 145 Mass. p. 347, decided in 1887, the court say:

"A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator."

This doctrine has long been well settled. Indeed, the rule as to ademption was laid down very clearly by Lord Chancellor Thurlow in *Humphreys* v. *Humphreys*, 2 Cox, 185, decided in 1789, as follows:

"That the only rule to be adhered to was to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death, for if it did not, then there must be an end of the bequest, and that the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." And see *Stanley* v. *Potter*, 2 Cox, 180.

As to the two mortgages aforesaid, we are of the opinion that the mere act of transferring them to her own name was not an ademption of them; for it is conceded that they were *in specie* at the time of her death, and the exact amount of their proceeds is clearly known and is held by the executor as a distinct fund. *Lee* v. *Lee*, 27 L. J. Ch. 824; *Moore* v. *Moore*, 29 Beav. 496.

Dingwell v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 Myl. & K. 296; *Ashburner* v. *MacGuire*, 2 Bro. C. C. 108; *Barker* v. *Rayner*, 5 Madd. p. 217, affirmed in 2 Russ. 122.

Basan v. *Brandon*, 8 Sim. 171. It is true that these securities are described as being in the hands of the trust company; but in *Prendergast* v. *Walsh*, 58 N. J. Eq. 149, decided in 1899, which was also a case of ademption, the vice-chancellor held that "the place of deposit was merely used as descriptive of the thing bequeathed. It was used to identify the particular money given, and it is entirely settled that where the place is merely descriptive the removal of the thing to another place is immaterial."

And, finally, we are of the opinion that the terms of the fifth clause, creating this specific legacy, should be strictly limited to the interest which Mrs. Perry had in the estate of her mother, Mrs. Dabney, without including the interest which came to Mrs. Perry as the heir of her sister, Mrs. Rhett.

A decree may be entered in accordance with this opinion.[1]

IZARD *v.* HURST.

Freem. C. C. 224. 1697.

THE defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff and gave her £700 portion; after that he makes a codicil

[1] See *Dingwell* v. *Askew*, 1 Cox Ch. 427.

On ademption of a lease by its renewal, see *Abney* v. *Miller*, 2 Atk. 593; *Carte* v. *Carte*, Ambl. 28.

Compare *Basan* v. *Brandon*, 8 Sim. 171; *Durrant* v. *Friend*, 5 De G. & Sm. 343; *In re Johnstone's Settlement*, 14 Ch. D. 162; *In re Dowsett*, [1901] 1 Ch. 398.

As to the ademption of bequests of a testator who has become insane and whose guardian has dealt with the property, see *Wilmerton* v. *Wilmerton*, 176 F. R. 896; *Hoke* v. *Herman*, 21 Pa. 301; *Taylor* v. *Taylor*, 10 Hare 475; *Jenkins* v. *Jones*, L. R. 2 Eq. 323; *Jones* v. *Green*, L. R. 5 Eq. 555; *In re Freer*, 22 Ch. D. 622.

and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held [by SIR JOHN TREVOR, M. R.] that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise [1] had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.[2]

[1] Compare *Leighton* v. *Leighton*, L. R. 18 Eq. 458.

[2] Compare *Estate of Brown*, 139 Iowa, 219, 223; *Swinebroad* v. *Bright*, 110 Ky. 616 (*statute*); *Jaques* v. *Swasey*, 153 Mass. 596; *Hayes* v. *Welling*, 96 Atl. (R. I.) 843; *Pym* v. *Lockyer*, 5 Myl. & Cr. 29.

"The ademption of a legacy of personal estate is not usually called revocation. When the term just mentioned is not used, the act is called satisfaction, payment, performance or execution. But when these terms are thus used, it is not quite in their ordinary sense; for their primary relation is to some debt, duty or obligation resting absolutely upon a party, whereas a will, having no effect in the testator's lifetime, does not bind him to anything. The word ademption is the most significant, because, being a term of art, and never used for any other purpose, it does not suggest any idea foreign to that intended to be conveyed. It is used to describe the act by which the testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death. (1 Roper, 365, ch. 6.) It is also used to denote the act by which a specific legacy has become inoperate on account of the testator having parted with the subject. But that is immaterial here. Aside from the Statute, an advancement of a like sum, with intent to pay the legacy in question, would, in the understanding of every lawyer, be an ademption. Now, the Statute does not say anything, in terms, respecting ademptions, nor does it allude to the subject in any way, unless it does so in using the term revocation. To revoke is to recall what one has done or promised. A testator who concludes to anticipate a proposed testamentary gift cannot be said, by any just use of language, to revoke or recall it, when, so far wishing to undo what he has done, he has concluded to do it sooner than he before intended. By a very loose and indeterminate use of language, anything which renders a bequest inoperative at the testator's death may possibly be called a revocation, and we are shown in the opinion referred to that there are instances where it has been so used. Lord Macclesfield is reported to have said, in a case of double portions, that by laws of all other nations, as well as of Great Britain, the last was a 'revocation of the portion given by the will.' The reference to foreign laws shows that the word was used in a very general, and not in a strict or technical sense. It was not said that the will or any part of it was revoked, but that it was a revocation of the portion. It was in a very short opinion taken down by the reporter. (1 P. Wms. 681.) But Lord Eldon, in a more elaborate opinion, in a case of alleged double portions, used the same terms for the like purpose. After qualifying the gift *inter vivos* as an ademption half a dozen times, and as satisfaction still oftener, and alluding to an objection made at the bar, that if the testator had not intended that the legacy should be paid he would have altered his will, he adds: 'The answer [to that objection] is, that the subsequent advance operates as a revocation, and therefore actual revocation is unnecessary.' The meaning is not that the subsequent advance was in a proper sense revocation,

CARMICHAEL *v.* LATHROP.

108 Mich. 473. 1896.

APPEAL from Wayne; Donovan, J. Submitted January 16, 1896. Decided February 26, 1896.

Bill by Marilla B. Carmichael against Ada M. Lathrop and Emily B. Lloyd to charge the defendants with the value of certain property alleged to have been conveyed to them in partial satisfaction of their legacies under the will of Henry P. Pulling, deceased. From a decree dismissing the bill, complainant appeals. Reversed.

HOOKER, J. The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that —

"*Second.* All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. . . .

"*Third.* I hereby authorize and empower my hereinafter named executors to see and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise investing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are

but that it operated in that instance in the same way; as if he had said there was no need of his revoking it, as the ademption or satisfaction just as effectually extinguished it. (18 Ves. 155.) But there are a few cases in which judges have been called on to discriminate, in precise and accurate language, between ademption and revocation. *Roswell* v. *Bennet*, 3 Atk. 77, already referred to, was the case of a legacy for a special purpose, which it was adjudged he had accomplished by an advance of money in the testator's lifetime. The defendant's counsel relied upon the Statute of Frauds and Perjuries. Lord Hardwicke said: 'As this act of the testator after making his will is not a *revocation* of the will, but an *ademption* only of the defendant's legacy, I am of opinion that the plaintiff ought to be let into this evidence,' &c. (3 Atk. 78.) In *Kirk* v. *Eddows*, which has been cited, the defence was that the legacy had been adeemed in part. The Vice-Chancellor, Sir James Wigram, said: 'The evidence [to prove his advancement] does not touch the will. It proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. An *ademption* of the legacy and not *revocation* of the will is the consequence for which the defendant contends.' The Vice-Chancellor then referred to the judgment of Lord Hardwicke, above mentioned. (3 Hare, 519.) These two cases are just one hundred years apart, and connected as the last is by a reference to the first, they may be taken to show the sense of the English Chancery, during all that time, upon the distinction in question." — *Per* DENIO, C. J., in *Langdon* v. *Astor*, 16 N. Y. 9, 39–42.

hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first-class, unincumbered real-estate mortgages, or in United States bonds or Michigan State bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will.

"And, lastly, I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother-in-law William P. Bridgman, of Detroit, and my son-in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made."

Mr. Pulling died in July, 1890, and the will was probated August 19, 1890. Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of $65,000, that there was due to him upon land contracts $45,000, that he owned other personal property to the amount of $30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth $14,000, and that received by Mrs. Lathrop said to be worth $10,000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other, daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however, gave to her money from time to time, for her support, which aggregated $1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed

to Mrs. Lloyd and Mrs. Lathrop before the testator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as an ademption or a satisfaction *pro tanto* of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters legatees, although they may have been also devisees as to the real estate, if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator.

If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee *in loco parentis*.[1] In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-writers have severely condemned this rule. See 2 Story, Eq. Jur. §§ 1110–1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, though it has met with approbation from other high authorities." 2 Williams, Ex'rs (7th Am. Ed.), *1194. Story's condemnation of it is strong, but he adds, "We must be content to declare, '*Ita lex scripta est.*' It is established, although it may not be entirely approved." And Worden, J., in *Weston* v. *Johnson*, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly

[1] As to when the testator is *in loco parentis*, see *Grave* v. *Salisbury*, 1 Bro. C. C. 425; *Monck* v. *Monck*, 1 Ball & B. 298; Ex parte Pye, 18 Ves Jr., 140; *Booker* v. *Allen*, 2 Russ & M. 270; *Powys* v. *Mansfield*, 3 Myl. & Cr. 359; *In re Ashton*, [1897] 2 Ch. 574.

established in English and American jurisprudence." *Shudal* v. *Jekyll*, 2 Atk. 518; *Ex parte Pye*, 18 Ves. 140, 2 White & T. Lead. Cas. Eq. (4th Ed.) 741; *Van Houten* v. *Post*, 33 N. J. Eq. 344. With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation (*Ex parte Pye*, 18 Ves. 140); but the rigor of this rule has been relaxed, and cannot now be said to be the law. *Pym* v. *Lockyer*, 5 Mylne & C. 29, 55; *Montague* v. *Montague*, 15 Beav. 565; 2 Williams, Ex'rs (7th Am. Ed.) *1195; *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; *Wallace* v. *Du Bois*, 65 Md. 153, 159. And see cases cited in 1 Pom. Eq. Jur. § 555, note 3. There are cogent reasons in support of the rule stated, — *i. e.* that payment to a son adeems the legacy, — which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. *Suisse* v. *Lowther*, 2 Hare, 424, 433.

While the authorities are a unit that a legacy by one *in loco parentis* will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. *Freemantle* v. *Bankes*, 5 Ves. 85; *Clendening* v. *Clymer*, 17 Ind. 155; 2 Story, Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full. *Pym* v. *Lockyer*, 5 Mylne & C. 29; *Montefiore* v. *Guedalla*, 1 De Gex, F. & J. 93. Again, it was held that it could not be applied unless the advancement was *ejusdem generis* with the legacy. See 2 Story, Eq. Jur. § 1109.

Counsel for the defendants contends that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, *even though that was the clear intent* of the testator," and he cites several authorities to sustain the proposition. In *Arthur* v. *Arthur*, 10 Barb. 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation *pro tanto*." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance

was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it.

The court of appeals considered the subject in *Burnham* v. *Comfort*, 108 N. Y. 535 (2 Am. St. Rep. 462). In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express understanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that, to sustain such claim, they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter," of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty." After discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented.

The supreme court of South Carolina, in the case of *Allen* v. *Allen*, 13 S. C. 512 (36 Am. Rep. 716), had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said:

"It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb that distribution of his property which he thought was proper and just to his descendants. For, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law."

Attention is also called to the case of *Swails* v. *Swails*, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, viz.: 60 acres to J., the son; and 40 acres to N., a grand-

son. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the devisor does not stand *in loco parentis*. The case followed *Weston* v. *Johnson*, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in *Campbell* v. *Martin*, 87 Ind. 577, it is said, "But we know of no reason whatever for the extension of this doctrine, and making it applicable to devises of real estate."

In *Marshall* v. *Rench*, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy, — *e. g.* where the conveyance to the devisee is of the same land, — because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except *Arthur* v. *Arthur*, hereinbefore discussed.

We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely, except the South Carolina case, and in that case the claim of ademption was sustained as as to the legacies.

2 Woerner, Adm'n, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that —

"Specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And, for the same reason, real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See *Hansbrough* v. *Hooe*, 12 Leigh, 316 (37 Am. Dec. 659).[1]

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to deprive a devisee of title to land willed to him, but it is claimed that the presumption that a *bequest* to a son is satisfied *pro tanto* by a gift is not to be applied where the gift is of land instead of money, or other personal property *ejusdem generis*.

In *Richards* v. *Humphreys*, 15 Pick. 140, will be found the following *dictum* of Shaw, C. J.:

[1] On the ademption of specific legacies and devises by subsequent gifts, see *Weston* v. *Johnson*, 48 Ind. 1; *Fisher* v. *Keithley*, 142 Mo. 244; *Burnham* v. *Comfort*, 108 N. Y. 535; *Clark* v. *Jetton*, 5 Sneed 229; *Jones* v. *Mason*, 5 Rand. 577; *Hansbrough* v. *Hooe*, 12 Leigh 316; *Davys* v. *Boucher*, 3 Y. & C. Exch. 397, 411.

"We have seen that ademption depends solely upon the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. *Had he purchased a house or other property* in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect."

It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction *pro tanto* of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is upon the legatee. *Ford* v. *Tynte*, 2 Hem. & M. 324. A gift to a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent.

There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, *e. g.* where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine *ejusdem generis* is its effect upon the presumption. The doctrine that the property conveyed must be *ejusdem generis* appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction *pro tanto*. It has been said in early cases that "when the gift by will and the portion are not *ejusdem generis*, the *presumption will be repelled*. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." *Bellasis* v. *Uthwatt*, 1 Atk. 428; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Ch. R. 159; *Saville* v. *Saville*, 2 Atk. 458; *Grave* v. *Earl of Salisbury*, 1 Brown, Ch. 425. But see *Bengough* v. *Walker*, 15 Ves. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see *Pym* v. *Lockyer*, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In *Jones* v. *Mason*, 5 Rand. (Va.) 577, the court said, "This whole class of cases depends upon the intention;" citing *Hoskins* v. *Hoskins*, Prec. Ch. 263, and *Chapman* v. *Salt*, 2 Vern. 646. Again, it was said: "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to

intention"; citing *Rickman* v. *Morgan*, 1 Brown, Ch. 63, 2 Brown, Ch. 394. In *Bengough* v. *Walker*, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of £2,000, when it was so intended. See, also, *Gill's Estate*, Pars. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of *ejusdem generis*. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that conveyance of real estate will not be held a satisfaction of any legacy, in whole or in part, even though the intent of the testator is clear."

We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proven in the manner provided by our statute for the revocation of wills, that is, by the destruction of the will, or the making of a new will." 2 How. Stat. § 5793; *Lansing* v. *Haynes*, 95 Mich. 16. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (*i. e.* payment) is shown. The will is not overturned or revoked. It is satisfied.

We think the prayer of the bill should be granted, and the record should be remanded to the circuit court for the county of Wayne, in chancery, for further proceedings. Decreed accordingly.

The other Justices concurred.[1]

JOHNSON *v.* McDOWELL, JAS. AND MELVIN WINKELMAN, APPELLANTS.

154 Iowa 38. 1912.

LADD, J.[2] — The estate left by B. F. Winkleman, deceased, after the payment of debts and costs of administration, amounted to $273.85. By the second clause of his will, executed in 1883, he bequeathed $600 to his niece, Ella McDowell, and by the third clause the residue of his estate to his nephews, James M. and Melvin Winkleman, the interveners. The issues raised by the pleadings were such that unless the legacy to Mrs. McDowell, was satisfied prior to the testator's death, the judgment of plaintiff against her was rightly ordered to be satisfied from a legacy to her; but, if

[1] Compare *In re Jaques*, [1903] 1 Ch. 267.

[2] The statement of facts is omitted.

satisfied, the entire amount passed to the interveners under the third clause of the will.

That the testator paid her $400 April 9, 1908, is not questioned, but, as he did not stand *in loco parentis*, no presumption arises therefrom that this was intended to be in satisfaction, even in part, of the legacy. *Re Youngerman*, 136 Iowa, 488; *Carmichael* v. *Lathrop*, 108 Mich. 473 (66 N. W. 350, 32 L. R. A. 232); *Re Brown*, 139 Iowa, 219.

Whether such payment was in satisfaction thereof necessarily depends upon the intention of the testator in making it and extrinsic evidence is admissible to aid in ascertaining such intention. *Allen* v. *Allen*, 13 S. C. 512 (36 Am. Rep. 718); *Richards* v. *Humphreys*, 15 Pick. (Mass.) 133; *Van Houten* v. *Post*, 33 N. J. Eq. 344; *Rogers* v. *French*, 19 Ga. 316; *Thomas* v. *Capps*, 5 Bush (Ky.) 276; *Kirk* v. *Eddows*, 3 Hare, 509.

Such evidence is resorted to not for the purpose of showing an intention of revoking or altering the will, but to establish the purpose of the testator in making the subsequent advance or payment; that is, whether he intended it to operate as a satisfaction of the legacy or as an additional bounty to the legatee. With this in mind, let us turn to the evidence. It appears that in April, 1908, the testator received from one Hunt in final settlement for the purchase of some land, the sum of $750, and out of this handed $400 to Mrs. McDowell, who was then present, and took the following receipt from her: "April 9, 1908. I, Ella McDowell, on the receipt of four hundred dollars ($400.00) in hand paid by B. F. Winkleman, hereby relinquish all claims, now and forever, against the estate of B. F. Winkleman. H. C. Winkleman, Witness. Ella McDowell."

Hunt, who testified, was asked: "Was there anything said as to what that $400 to her was for? A. Now, when I went up there and settled with B. F. Winkleman, it was understood, I presume, by that that she was to get $400, and, before she should receive that, she had to sign her right away; that is, what she should receive out of B. F. Winkleman's estate. Q. That was said there in your presence? A. Oh, certainly; yes, sir."

This was the only evidence bearing on the subject except proof that deceased was unmarried, without children, and then residing at the home of a brother, but immediately thereafter went to live with Mrs. McDowell and husband. There was no evidence indicating that Mrs. McDowell held any claim against the heirs. About twenty-five years prior thereto, he had in his will made her his legatee, and it seems very clear in the light of the oral testimony that both she and deceased intended the amount paid to cover whatever she might take from his estate. It is true that he went to live with the legatee thereafter, but there is no showing of how long he remained with her or of an understanding had with reference thereto, and there is no foundation for the assumption of the appellee that this payment

might have been for future support. True, there is no specific reference in the receipt or testimony to the legacy. But the witness testified that she "had to sign the right away; that is, whatever she should receive out of B. F. Winkleman's estate." This was broad enough to cover what she might claim as heir or legatee. It is not be be assumed that he had forgotten the will as suggested by appellee, and though there is no proof of the fact, both parties assume in argument that he was about eighty years old. The evidence discloses that he had a small estate and, in the absence of any showing, we are not ready to infer that he was handing this money over to his niece for some disclosed purpose rather than that established by the evidence. In view of the amount of property he had, it is not reasonable to suppose he intended to make his niece a gift of the $400 in addition to the legacy. Indeed, the receipt would scarcely have been given, had a gift been intended, nor could it have been intended, if the payment of an existing debt, for the claims mentioned are those against the estate and ordinarily such a receipt, if in satisfaction of an indebtedness, would at least refer to it in some way as an existing obligation. The parties were evidently dealing with reference to the future, and though the word "claims" as ordinarily used may mean pecuniary obligations, it often has a much broader meaning, and there is nothing to indicate that it was employed in that restricted sense in the receipt and the testimony of Hunt clearly proves that such was not the purpose.

The appellee contends that the finding of the court should be accorded the conclusiveness of a verdict of the jury. Undoubtedly, such is the rule when there is a conflict in the evidence, but the record is such that only one reasonable inference is deducible therefrom. Mrs. McDowell had an interest in expectancy to relinquish as legatee, and as she was to sign away what she should receive from testator's estate, it ought not to be inferred against the undisputed evidence that, in doing so, she had another purpose, and that the testator in paying her money had another design in mind not expressed. While the evidence is meager, we think the only conclusion to be drawn therefrom is that the money was paid with the design of satisfying the legacy. That it was less in amount than the bequest can make no difference. The legacy was subject to the testator's absolute control, he could satisfy and discharge it by advancing any sum of money in lieu thereof, or he could revoke it entirely without the assent or approbation of the legatee.

We think the evidence conclusive, not only that he intended the payment as a satisfaction of the legacy, but that it was received with that understanding. It follows that the fund in controversy passed to the interveners under the third clause of the will, and the judgment is *reversed*.[1]

[1] Compare *Weston* v. *Johnson*, 48 Ind. 1, 5; *Estate of Youngerman*, 136 Iowa 488; *Gallagher* v. *Martin*, 102 Md. 115; *Richards* v. *Humphreys*, 15 Pick. 133; *Allen* v.

STRONG *v.* WILLIAMS, EXECUTOR.

12 Mass. 391. 1815.

THE plaintiff declared in debt upon a bond of made to her by Woodbridge Little, Esq. the defendant's testator, dated the 18th of August 1800, conditioned to pay her 200 dollars within one month after her marriage, if such event should take place in the lifetime of the obligor, or that his heirs, executors or administrators should pay her 333 dollars 33 cents within six months after his decease.

The action was referred to the decision of the court upon an agreed statement of facts to the following effect. On the day of making the bond declared on, the testator made a written promise to the plaintiff, then resident in his family, to pay her twenty dollars annually, so long as she could continue in his family, and to provide for her during the same time in all kinds of clothing, and all articles which she might need, both in health and sickness; the plaintiff at that time living in the testator's family, as a maid and housekeeper. Payment of the said annuity was regularly endorsed on said promise until the year 1806, and the plaintiff duly received the other articles therein stipulated, and continued to live in the testator's family until his decease.

On the 20th of March 1813, the said testator made his last will, which was approved after his decease, and of which the defendant is executor; and on the 21st of June following, the testator died, leaving neither wife nor issue. In the said will the said testator, in consideration of the long, faithful, friendly and meritorious services of the plaintiff, both to himself and his then late beloved wife, bequeathed to her his household furniture, with sundry other valuable chattels, three hundred dollars in cash, and also the use of his homestead for six months, or half the rents thereof for the first twelve months after his decease, at her election.

The specifick articles so bequeathed were of the value of 745 dollars 84 cents, and the rent of the said homestead for six months was equal to 50 dollars: all of which the plaintiff had received, together with the said cash legacy. — The amount of the testator's estate and

Allen, 13 S. C. 512; *Powell* v. *Cleaver*, 2 Bro. C. C. 499; *In re Shields*, [1912] 1 Ch. 591.

On the ademption of a legacy of the residue by a subsequent gift, see *Davis* v. *Whitaker*, 38 Ark. 435, 449; *Clendening* v. *Clymer*, 17 Ind. 155; *Van Houton* v. *Post*, 32 N. J. Eq. 709; *Allen* v. *Allen*, 13 S. C. 512, 527; *Thynne* v. *Glengall*, 2 H. L. C. 131; *Montefiore* v. *Guedalla*, 1 DeG. F. & J. 93; *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258, 267, 268.

When a legacy is given for a special purpose and the testator fulfils the purpose in his lifetime, the legacy is adeemed. *Tanton* v. *Keller*, 167 Ill. 129; *Taylor* v. *Tolen*, 38 N. J. Eq. 91, 96, 97; *Grogan* v. *Ashe*, 156 N. C. 286; *Johnson's Estate*, 201 Pa. 513; *Pankhurst* v. *Howell*, L. R. 6 Ch. 136; *In re Pollock*, 28 Ch. D. 552; *In re Fletcher*, 38 Ch. D. 373, 377; *In re Smythies*, [1903] 1 Ch. 259.

credits was 3346 dollars 66 cents, and of the legacies payable in money, 2200 dollars. All the residue of his estate, after payment of debts, (which were of trifling amount,) and legacies, he devised to the corporation of *William's college*, under whose direction the defendant contended that the bond had been satisfied by the payment of the said legacies to the plaintiff.

If in the opinion of the court the plaintiff was entitled to recover the sum due by the bond, in addition to the said legacies, judgment was to be rendered in her favor upon the default of the defendant: otherwise the plaintiff was to become nonsuit.

PUTNAM J. delivered the opinion of the court.

The general rule anciently established in chancery was, that when a testator being indebted gave to his creditor a legacy equal to, or exceeding the amount of his debt, the legacy should be considered as a satisfaction for the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention (1 *Bro. Cha. Ca.* 131. *Haynes* v. *Mico*). Thus where the testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So if the legacy was of a less sum than the debt; or of a different nature; or upon conditions; or not equally beneficial in some one particular, although more so in another.

All the cases agree that the intention of the testator ought to prevail; and that, *prima facie* at least, whatever is given in a will is to be intended as a bounty. But by later cases the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstances of the case should lead to a different conclusion.

Thus in the case cited for the plaintiff (2 *Vern.* 498. *Brown* v. *Dawson*), where the wife joined in the sale of her jointure, and the husband gave her a note of 7*l.* 10*s.* *per annum* for her life; and afterwards upon another such sale he gave her a bond for 6*l.* 10*s.* *per annum* for her life; and he afterwards made his will, and gave her 14*l.* *per annum* for life: the legacy was adjudged to be a satisfaction for the note and bond. Here it will be perceived that the annuity given in the will amounted exactly to the sums secured by the bond and note: and the presumption of satisfaction proceeded upon the similitude of the legacy to the debt (2 *Fonbl.* 330, *in notis*). So in the case of *Fowler* v. *Fowler* (3 P. *Will.* 353) the general rule was applied. There the husband, being indebted to the wife for arrears due by the marriage settlement, gave her a larger legacy by the will: and it was held a satisfaction of the debt. But it is to be observed that lord chancellor Talbot expressed great dissatisfaction with the rule: and it does not appear that any circumstances could be found, to take the case out of its general application. In that case the

court refused parole evidence, to prove that the testator intended both should be paid.

But cases of this nature must depend upon the circumstances: and there must be a strong presumption, to induce a belief that the testator intended the legacy as a payment, and not as a bounty (2 *Fonbl.* 332). Thus where the testatrix had given her servant a bond for 20*l.* free of taxes for her life, and afterwards made her will and gave the servant 20*l.* *per annum* payable half yearly, but said nothing about the taxes, the court held that both should be paid (2 *Vern.* 478. *Atkinson* v. *Webb*). — Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment.

So where the testator having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by lord chancellor Cowper, that the testator might be presumed to be kind as well as just: and he decreed the payment of the legacy as well as the debt (1 *Salk.* 155. *Cuthbert* v. *Peacock*). It has been holden that a legacy for a less sum than the debt shall never be taken as satisfaction (*Salk.* 508); and *specifick things* devised are never to be considered as satisfaction of a debt, unless so expressed (2 *Eq. Ca. Abr. title Devises pl.* 21, *cited Bac. Abr. Legacies D*).

So the circumstance, that the testator had devised "that all his debts and legacies should be paid," was holden sufficient to take the case out of the general rule: as where the testator, indebted to his maid servant 100*l.*, *by bond for wages*, afterwards gave her 500*l.* lord chancellor King decreed that both should be paid; and as the testator had made provision for the payment of his debts (1 *P. Will.* 408, 409, *vide note*).

So where it appeared that the legatee had lived with the testatrix as a servant for twenty or thirty years, and she had given her a bond for 260*l.* and in one month afterwards she made her will and gave her 500*l.* and in another clause she gave the rest of her servants 5*l.* apiece, but not to *Jane Greese*, the legatee; "because," said the testatrix, "I have done well for her before"; and she also made provision for her debts and legacies. Lord Hardwicke thought the circumstances above stated took the case out of the general rule, and decreed the legacy to be no satisfaction for the debt (3 *Atk.* 65. *Richardson* v. *Greese.* — *2 Atk.* 301. *Nichols* v. *Judson. S. P.* — 3 *Atk.* 97. *Clarke* v. *Sewall. S. P.*).

So where the testator was indebted *for goods on an open account*, a legacy for a larger sum was not held a satisfaction: because he might not know whether he was indebted or not; and therefore no presumption was to arise, that he intended merely to pay a debt (1 *P. Will.* 299. — 10 *Mod.* 201. *Powel's case. S.* P.).

In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption

that the legacy was intended to be a satisfaction of the bond also, must rest on the fact that the bond was given for the same services: of which fact there is no evidence before us. It may have been for a different cause. We can only presume that it was for a lawful one.

It appears also from the will, that the testator intended his debts and legacies should be paid, before his residuary legatees should take any thing. The pecuniary legacy to the plaintiff also is not so much as the debt; and therefore cannot be considered as a payment of it. Neither is there any declaration of the testator, that the specifick articles given should be considered as a satisfaction of the debt. It appears also that there are sufficient assets.

From a consideration of the principles and decisions applicable to this case, we are therefore all of opinion that the plaintiff ought to recover.

Defendant defaulted.[1]

HOLT *v.* LIBBY AND TRUSTEES.

80 Maine 329. 1888.

PETERS, C. J. It is a general rule, in the settlement of legacies by an executor, that he may retain the legacy, the whole or a sufficient portion, in satisfaction of the legatee's debt to the estate, if the testator does not indicate, either in the terms of the bequest or in other parts of the will, that it shall be otherwise. This is the rule both in law and equity.

The English practice goes further, and allows the rule to prevail, on the idea of lien, as to debts which have become barred by the statute of limitations. The leading case maintaining the English rule seems to be *Courtney* v. *Williams*, 3 Hare 539. Subsequent English cases follow in the same line. *Rose* v. *Scales*, 15 Beav. 189; *Coates* v. *Coates*, 33 Beav. 249; 1 Redf. Wills, 489, and cases cited in note. One or two of the American state courts may have practiced on the English rule.

But a legacy was recoverable in England, in the day of the au-

[1] For cases where a legacy was taken in satisfaction of a debt due from the testator, and where not, see *Thompson* v. *Wilson*, 82 Ill. App. 29; *Cloud* v. *Clinkinbeard*, 8 B. Mon. 397; *Edelen* v. *Dent*, 2 Gill & J. 185; *Allen* v. *Merwin*, 121 Mass. 378; *Gilliam* v. *Brown*, 43 Miss. 641; *Adams* v. *Adams*, 55 N. J. Eq. 42; *Broughton* v. *Flint*, 74 N. Y. 476; *Reynolds* v. *Robinson*, 82 N. Y. 103; *Horner* v. *McGaughy*, 62 Pa. 189; *Newel* v. *Keith*, 11 Vt. 214; *Stewart* v. *Conrad*, 100 Va. 128; *Fowler* v. *Fowler*, 3 P. Wms. 353; *Richardson* v. *Greese*, 3 Atk. 65; *In re Horlock*, [1895] 1 Ch. 516; *In re Rattenberry*, [1906] 1 Ch. 667; *Central Trust Co.* v. *Snider*, [1916] A. C. 266; 1915 B. L. R. A. N. S. 1156 note.

For cases on the satisfaction of portion debts, see *Weir* v. *Weir*, 3 B. Mon. 645; *Williams* v. *Williams*, 43 Miss. 437; *Taylor* v. *Lanier*, 3 Murph. 98; *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; *Chichester* v. *Coventry*, L. R. 2 H. L. 71; *In re Fletcher*, 9 Ch. D. 381. Maitland, Equity, pp. 181–187; 2 Pomeroy, Equity Jurisdiction (3d ed.), §§ 565 *et seq.*

thorities cited, only in chancery. The same rule of equitable set-off prevails in that country not only as to legacies, but also as to the share of one entitled as next of kin in the estate of an intestate. *In re Cordwell's Estate*, L. R. 20 Eq. 644. The reason assigned in the latter case for the rule is, that "until the debtor discharges his duty to the estate by paying the debt he owes to it, he can have no right or title of it under the statute."

This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will, especially debts against his children and relatives. In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstance arising to make it expedient to regard them as debts. The question under discussion has been in Maine already practically, and in Massachusetts expressly and fully, decided in accordance with these views. *Wadleigh* v. *Jordan*, 74 Maine 483; *Allen* v. *Edwards*, 136 Mass. 138.

The other question of the case is, whether a plaintiff, who attaches a legacy by the trustee process, is permitted to set up the limitation bar to an offset claimed by an executor against the debtor-legatee. We think it is both logical and reasonable that the creditor should have the same right to the thing attached and all its incidents that the debtor has. If his attachment becomes perfected, the debtor's right becomes his right, and he should have the power to save and protect it as if his own. The law can make an assignment of the legacy as effectually as the legatee himself can. Otherwise, we should in the present case have, as has been suggested, the curious result of an attaching creditor failing to collect a legacy which his debtor can collect. It would allow an assignor to enjoy the benefit of a claim the title to which had legally passed to an assignee. The principle involved in this point has been virtually settled in favor of the plaintiff by the case of *Sawyer* v. *Sawyer*, 74 Maine 580, and the very satisfactory reasoning in that case is as pertinent to the facts in this case as to the facts there.

By R. S., ch. 65, § 31, any legatee of a residuary or specific legacy under a will may recover the same in a suit at law. The word specific is not here used in a strictly technical testamentary sense, but means definite, particular, or special. Any legacy may be recovered by

legal remedy, unless from exceptional reasons, equity should be resorted to.

Exceptions sustained.[1]

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

[1] A personal representative may not retain a legacy or distributive share in payment of a debt from the legatee or distributee which is barred by the statute of limitations. *Allen* v. *Edwards*, 136 Mass. 138; *Boden* v. *Mier*, 71 Neb. 191; *Drysdale's Appeal*, 14 Pa. 531; *Reed* v. *Marshall*, 90 Pa. 345. *Noble* v. *Tait*, 140 Ala. 469; *Gray* v. *Hayhurst*, 157 Ill. App. 488; *Holmes* v. *McPheeters*, 149 Ind. 587; *Holden* v. *Spier*, 65 Kan. 412; *Ex parte Wilson*, 84 S. C. 444; *Tinkham* v. *Smith*, 56 Vt. 187; *Courtenay* v. *Williams*, 3 Hare 539; *In re Cordwell's Estate*, L. R. 20 Eq. 644, *contra*. See *Garrett* v. *Pierson*, 29 Iowa 304; 4 L. R. A. N. S. 189 note.

Retainer where the debt due from the legatee or distributee to the estate is barred by bankruptcy. *Parker* v. *Grant*, 91 N. C. 338; *Wilson* v. *Kelly*, 16 S. C. 216.

NOTE.— The following cases discuss the date from which a will is considered to speak, and some of them the interpretation Sec. 24, of the Wills Act, *ante* p. 36: "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." *Cornwall* v. *Hill*, 135 Ky. 641; *Reuling* v. *Reuling*, 137 Ky. 637; *Shaffer's Succession*, 50 La. Ann. 601; *Everett* v. *Carr*, 59 Me. 325, 332; *Bourke* v. *Boone*, 94 Md. 472; *Morse* v. *Mason*, 11 Allen 36; *Voorhies* v. *Otterson*, 66 N. J. Eq. 172; *Eells* v. *Lynch*, 8 Bosw. 465; *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Gwyn* v. *Gwyn*, 1 Jones Eq. 145; *Board of Education* v. *Ladd*, 26 Ohio St. 210; *Anshutz* v. *Miller*, 81 Pa. 212; *Sharpe* v. *Allen*, 5 Lea 81; *Farley* v. *Farley*, 121 Tenn. 324; *Gayre* v. *Gayre*, 2 Vern. 538; *Sayer* v. *Sayer*, 2 Vern. 688; *Masters* v. *Masters*, 1 P. Wms. 421, 424; *All Souls College* v. *Coddrington*, 1 P. Wms. 597; *Abney* v. *Miller*, 2 Atk. 593, 597; *Dean* v. *Barrow*, *Ambler* 644; *Green* v. *Symonds*, 1 Bro. C. C. 129n; *Cockran* v. *Cockran*, 14 Sim. 248; *Cole* v. *Scott*, 16 Sim. 259; *Goodlad* v. *Burnett*, 1 K. & J. 341; *In re Gibson*, L. R. 2 Eq. 669; *Wagstaff* v. *Wagstaff*, L. R. 8 Eq. 229; *Castle* v. *Fox*, L. R. 11 Eq. 542; *In re Portal and Lamb*, 30 Ch. D. 50; *Will of Georgetti*, 1900 N. Z. L. R. 849; *In re Slater*, [1907] 1 Ch. 665, 670, *In re Evans*, [1909] 1 Ch. 784; *In re Clifford*, [1912] 1 Ch. 29; *Will of Smith*, [1916] Vict. L. Rep. 540; 1 Jarman, Wills (6th Am. Ed.), c. X.

CHAPTER V.

GRANT OF PROBATE AND ADMINISTRATION.

NOTE ON COURTS OF PROBATE AND PROCEDURE THEREIN.

I.

Courts having Jurisdiction.

"In the earliest times the grant of probate and of administration took place, if at all, in the temporal courts. See 1 Thorpe, Anc. Inst. 413, 500; *Hensloe's Case*, 9 Co. 36, 38; 3 Seld. Op. 1667–1671, 1677, 1678. But the full and (with the exception of a few manorial courts) exclusive jurisdiction of the ecclesiastical courts in these matters was firmly established before the end of the fourteenth century. See Glanv. Lib. 7, *c.* 8; Mag. Cart. (John), § 27; St. 31 Edw. III. *c.* 11; Coote, Ecc. Prac. 21–58; 3 Seld. Op. 1678–1681; *Dyke* v. *Walford*, 5 Moo. P. C. 434.

"The law administered by the ecclesiastical courts is the ecclesiastical law. 1 Thorpe, Anc. Inst. 495. This, at any rate since Henry VIII.'s time, has been the King's Ecclesiastical Law. St. 25 Hen. VIII. *c.* 21 (1533), Preamble. See *Queen* v. *Millis*, 10 Cl. & F. 534, 680 *et seq.* The *substantive testamentary law* seems to be largely of native growth. The contributions taken in England from the Civil Law concerned more the construction than the validity of wills; and next to nothing was taken in testamentary matters from the Canon Law. The *procedure*, however, in the English ecclesiastical courts was kept closely on the lines of the Canon Law.

"The person who has independent jurisdiction in ecclesiastical courts over any territory is *the ordinary*. (He is usually the bishop.) According to the characteristic of the canon law, he can delegate his judicial authority, and generally does so to one who is called variously official principal, chancellor, commissary, or official. 3 Burn, Ecc. Law (9th ed.) 39; Co. Lit. 344 *a*; 2 Inst. 398.

"England and Wales were divided into two provinces, Canterbury and York. Canterbury had twenty-two dioceses, and York five. In some, but not all, dioceses, there was one or more archdeaconries.

"There were three classes of courts, —

"I. Those not exempt from the usual appellate jurisdiction. Here an appeal lay from the Archdeaconry Courts to the Bishops' Courts, which were called Consistory Courts; from the Consistory Courts to the Provincial Courts of Appeal; and from the Provincial Courts of Appeal to the Court of Delegates.

"The Consistory Courts had not only appellate jurisdiction from the Archdeaconry Courts, but also (concurrently with the Archdeaconry Courts, when any) original jurisdiction. Some bishops also had other courts which had jurisdiction (*semble* not exclusive of the Consistory Courts) over parts only of the diocese. From all the Bishops' Courts an appeal lay to the Provincial Courts of Appeal. In Canterbury the Court of Appeal was called the Court of the Arches, and the judge the Official Principal of the Arches; in York the Court was called the Chancery Court of York, and the judge the Official Principal.

"From the Provincial Courts appeals lay to the Court of Delegates, which took the place of the appeal to Rome. This was a commission named for each case by the king, made up of common law judges, usually three, one from each Superior Court, and of from four to six doctors of the Civil Law. See Rep. Ecc. Com. 6. The court announced its judgment without giving reasons. If it was divided equally, or if no

common law judge was in the majority, commissions of adjunct were issued, until a majority with a common law judge in it was obtained. See 1 Lee, 239–241. Finally a commission of review might be granted, on recommendation of the Lord Chancellor, which was rarely given. See *Mathews* v. *Warner*, 4 Ves. 186. See Rep. Ecc. Com. App. 207–209.

"II. The second class of courts included those exempt from the usual jurisdiction. These comprised (1) *Royal Peculiars*, where the appeal lay formerly directly to Rome. Appeal directly to the Delegates. (2) A few *manorial courts*, which still retained the power to grant probate and administration within a manor. Appeal directly to the Delegates. (3) *Peculiars* of deans, sub-deans, prebendaries, vicars, &c. *Parham* v. *Templar*, 3 Phillim. 223. Appeal directly to the Provincial Courts of Appeal. [N. B. There seem to have been some of these peculiars, which were exempt from the archdeacon's jurisdiction, but not from the bishop's.] (4) *Archdeacons' Peculiars.* (5) *Bishop's Peculiars.* (A) In his own diocese, exempt from the Court of the Archdeaconry in which they lay. (B) In another diocese, exempt from the jurisdiction of the bishop of that diocese, and from which appeals lay directly to the Provincial Courts of Appeal. 3 Burn, Ecc. Law, (9th ed.) 94, 95. (6) *Archbishop's Peculiars.* Some of the peculiars of the Archbishop of Canterbury (mainly in and near London) have a common court, called the Canterbury Court of Peculiars. The judge is called the Dean of the Arches; the office has often been held by the Official Principal of the Arches, *vide supra*, and the judge is more commonly known by the former title than the latter.

"III. The third class of courts comprised the Prerogative Courts, one in each province. Here wills were proved and administration was granted when the deceased left goods in more than one diocese. The appeal lay to the Delegates. The Prerogative were purely testamentary courts.

"The judges of all ecclesiastical courts could appoint surrogates to sit in their place. The counsel in these courts were called advocates, and had to be doctors of the civil law. They were incorporated into a college, called Doctors' Commons; the proctors corresponded to attorneys.

"In 1832 and 1833, by Sts. 2 & 3 Wm. IV. *c.* 92, and 3 & 4 Wm. IV. *c.* 41, the appeal to the Delegates from the ecclesiastical courts was taken away, and an appeal given to the Privy Council, acting through the Judicial Committee; in 1857, all jurisdiction in testamentary matters was taken from the ecclesiastical courts and given to a single Court of Probate, from which an appeal lay to the House of Lords; and the exclusive privilege of advocates and proctors was taken away. Under the Judicature Act "the Probate, Divorce, and Admiralty Division" is one of the Divisions of the High Court of Justice. An appeal lies to the Court of Appeal, and thence to the House of Lords. 36 & 37 Vict. (1873), *c.* 66, §§ 19, 31; 39 & 40 Vict. (1876), *c.* 59, § 3.

"The regular series of reports in the ecclesiastical courts begins in 1809, though Lee's Reports contain opinions, generally brief, from 1752–1758, and the Appendix to the second volume has some cases from 1726–1732. There are very few cases in any other Reports before 1809. The cases are almost all in the Prerogative and Arches Courts of Canterbury and the Consistory Court of London. Instances of cases in other courts will be found, 1 Phillim. 201, 287; 2 Phillim. 403; 1 Add. 96, 124, 411; 1 Hag. Ecc. 48; 3 Hag. Ecc. 618, 726; 1 Curt. 447; 2 Curt. 376; 3 Curt. 338; 1 Notes of Cases, 315.

"No process lay for the removal of cases from the ecclesiastical courts by *certiorari* or otherwise.

"*Mandamus* lay from the Court of King's Bench to compel the judges of the ecclesiastical courts to grant probate of undisputed wills, or to grant administration according to the Statutes. *Rex* v. *Raines*, 1 Ld. Raym. 361; *Anon.*, 1 Stra. 552; *Rex* v. *Bettesworth*, 2 Stra. 857, 1118; *Smith's Case*, Ib. 891; *The King* v. *Dr. Hay*, 1 W. Bl. 640.

"Prohibition was the common process to restrain proceedings in the ecclesiastical courts, usually for exceeding jurisdiction. If prohibition was not granted, a writ called "a consultation" sent the case back. 1 Wms. Saund. 136–140. Each of the Superior

Courts of Common Law could grant a prohibition. In *Gorham* v. *Bishop of Exeter*, a prohibition was sought in vain from the three Superior Common Law Courts in succession. 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630. On the question whether the Privy Council could be prohibited, see *Combe* v. *Edwards*, 3 P. D. 103; *Martin* v. *Mackonochie*, 4 Q. B. D. 697.

"In every county of each of the United States there is a tribunal which grants probate and administration. Generally it is a separate court (though sometimes with the same judge as the County Court). Its most common title is Probate Court. In New York, however, it is styled the Surrogate's Court; in New Jersey, the Prerogative Court; in Georgia, the Court of Ordinary; in Pennsylvania and some other States, the Orphans' Court. Sometimes probate and administration are part of the business of the County Court.

"An appeal lies, on matters of law, directly or indirectly, to the Supreme (or highest) Court of the State. That court seldom, therefore, has occasion to issue *certiorari*, *mandamus*, or prohibition." 4 Gray Cas. on Prop. (2d ed.), pp. 411–413.

II.

"*Procedure.*

"Probate is obtained either in common form or in solemn form.

"It is obtained *in common* form on production of the instrument, and oath of the executor that he believes it to be the will. This is enough if the instrument is in regular form. But if it is not in regular form (or if, before the Wills Act, it was not attested), affidavits to prove execution are required.

"*Proof in solemn form, or* per testes. — (1) The next of kin or other person interested in denying the validity of the will may enter a *caveat*, and the executor must then prove in solemn form. (2) The executor may *sua sponte* cause the next of kin, &c., to be summoned to come in and attend proof in solemn form. (3) The next of kin or a legatee interested under another will or codicil may after probate in common form cause the executor to be summoned to have the first probate annulled.

"When a will is to be proved in solemn form the court directs both parties to file 'affidavits of scripts,' with all the writings under which they claim appended; and on the next court day these affidavits are filed. Coote, Ecc. Prac. 471–477.

"The plaintiff, who is generally the executor, propounds the will, and then brings in his libel (or, as it is called in testamentary causes, his allegation), which comprises the positions and articles, *i. e.*, the matters to be answered by the defendant and by the witnesses. Langdell, Eq. Pl. §§ 16, 21, 25. This allegation may be opposed, which raises a question of law, the judge deciding whether the allegation is to be admitted, rejected, or reformed. Langdell, § 25. The other party puts in his personal answers under oath to the positions, and witnesses are examined on the articles, and cross-examined on interrogatories; then the other party puts in his allegation, the positions and articles of which are answered in like manner. When all the allegations are in, and the answers taken, then and then only the evidence is published. 3 Burn, Ecc. Law (9th ed.) 195; Langdell, §§ 25–29.

"A hearing is had, and then judgment given in the form of an 'interlocutory decree having the force and effect of a definitive sentence in writing.' This differs from a definitive sentence only in the fact that the latter is signed by the judge, while the former is only a statement of the register. It has the same effect as a definitive sentence, and an appeal lies from it. 3 Burn (9th ed.) 207, 210, 211, 218; Coote, 631 *et seq.*

"The proceeding in probate cases is now much simplified in England. In several of the United States the distinction between proof in common form (where the will is proved *ex parte*) and proof in solemn form exists. The proof in solemn form is sometimes in the Probate Court, sometimes by appeal to a higher court, sometimes by way of bill in equity to set aside the probate. See 1 Woerner, Amer. Law of Adm. § 215. In other States there is but one kind of proof. A common provision is that if there is

no opposition, a will may be proved by one witness. Generally there are no pleadings in the probate courts in this country; when there are any, they are very simple. Evidence is given orally. When a case is tried by a jury, it is sometimes on an issue of *devisavit vel non*, sometimes as to particulars of competency or undue influence.

A lost will may be admitted to probate on proof of its contents on the evidence of one, and he an interested witness. *Sugden* v. *St. Leonards*, 1 P. D. 154. But see *Woodward* v. *Goulstone*, 11 Ap. Cas. 469.

In a few cases courts have stricken scandalous matter out of the probate, but they do so with hesitation and reluctance. See *Goods of Wartnaby*, 1 Rob. Ecc. 423; *Marsh* v. *Marsh*, 1 Sw. & Tr. 528, 536 (1860); *Curtis* v. *Curtis*, 3 Add. 33 (1825); *Goods of Honywood*, L. R. 2 P. & D. 251 (1871). [*Estate of White*, [1914] P. 153. Ed.]

"In England a copy of the will with a certificate, and called a probate, is given to the executor. It is the sole evidence of his appointment. In the United States letters testamentary are generally issued to the executor, and the will is recorded.

"On including in the probate papers referred to in the will, see *Newton* v. *Seaman's Friend Soc.*, 130 Mass. 91 (1881), and cases cited. But see 1 Redf. on Wills, *267, *note* (41).

"In *Haddock* v. *Boston & Maine Railroad*, 146 Mass. 155 (1888), probate of a will was granted sixty-three years after the death of the testatrix." 4 Gray, Cas. on Prop. (2d ed.), pp. 414, 415.

SECTION I.

JURISDICTION.

BOLTON ET AL., APPELLANTS *v.* SCHRIEVER ET AL., RESPONDENTS.

135 N. Y. 65. 1892.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 7, 1891, which affirmed a judgment in favor of defendants, entered upon a verdict directed by the court and also affirmed an order directing an extra allowance.

The nature of the action and the facts, so far as material, are stated in the opinion.

PECKHAM, J.[1] This is an action of ejectment to recover possession of a lot of land on Tenth avenue, between 33d and 34th streets, in the city of New York. The land belonged at the time of his death to one Theodore B. Talmadge, who died in January, 1841. Mr. Talmadge is the common source of title, the plaintiffs claiming as his heirs at law, while the defendants claim, through his will, which in May, 1841, was proved before the surrogate of the county of New York, and letters granted to the executor named therein. It is claimed by plaintiffs that Mr. Talmadge died in the county of Columbia, and that at the time of his death he was not an inhabitant of New York county, and the surrogate of that county had no jurisdiction to take proof of the will or to grant letters testamentary thereon, and as there was no other proof of the execution of the will the defendants made out no title to the land and the plaintiffs were entitled to recover it as heirs at law of Talmadge

There was a hearing before the New York surrogate and a judicial investigation, and the result was the judgment or decree admitting the will to probate. The infant daughters of the testator appeared on this investigation by guardian appointed by the surrogate. This judgment, now over fifty years old, is assailed by the plaintiffs, and if it can be successfully attacked in this collateral manner it may follow that the defendants, by reason of this great lapse of time, will have no means of proving the will and thus will have no defense to interpose to the plaintiffs' claim, although they have relied upon the sufficiency of a judgment over half a century old decreeing that the will of Mr. Talmadge was properly proved, and under which their mediate grantor (Mr. Talmadge's executor) had power to convey the land in dispute.

[1] A portion of the opinion on the question of costs is omitted.

The petition of the executor named in the will to the surrogate of New York, alleged that the deceased was at or immediately previous to his death, an inhabitant of the county of New York, by means of which the proving of the will belonged to such surrogate.

The surrogate, in admitting the will to probate and issuing letters testamentary to the executor, in effect decided the fact of inhabitancy, for it was a fact necessary for the surrogate to decide before admitting the will to probate or granting letters, and his decision of that fact, based upon evidence having a legal tendency to support it, ought, it would seem, on general principles, to stand until reversed or set aside, even though it were erroneous.

Much of the general importance which might otherwise attach to the decision of this question is taken from it by reason of legislation upon the subject. In 1870 an act was passed which applied to judgments of surrogates' courts in New York county and in 1880 a similar act was passed in regard to those courts in all the other counties of the state. (Chap. 359 of the Laws of 1870; Code Civ. Pro. § 2475. These acts provided in substance that the objection to the jurisdiction of such judgments should not be taken collaterally.

We are of opinion that in a case like the present the same rule obtains, which has been authoritatively declared as to future cases by the statutes cited. Under these circumstances we do not feel called upon to enter into any detailed and extended discussion of the grounds for our decision. It is unnecessary to go as far, in order to uphold the decision of the courts below, as the court went in the decision of the first *Roderigas* case (63 N. Y. 460). This case differs from that in the main and important fact that there was here an estate of a deceased person to administer upon. Mr. Talmadge died in the state of New York and at the time of his death he was an inhabitant thereof. In the *Roderigas* case letters were issued to an administrator upon the estate of a living man, but who was in effect declared by the judgment to be dead.

We think that where the individual died an inhabitant of the state by reason of which there was in fact an estate to be administered upon, and the only question is which of the Surrogate's Courts in the counties of the state should act, there is in that case jurisdiction in one of these counties over the subject-matter, that is, over the administering upon the estate of a deceased person dying an inhabitant of the state, and which surrogate is to exercise such jurisdiction depends upon the fact as to which county deceased was an inhabitant of at the time of his death. The decision of such question where evidence is given, and upon a hearing of the parties, ought to be and, we think, is conclusive upon any collateral attack. Under our statute as to proof of wills, although it does not in terms provide that the petition shall state, or that the surrogate shall inquire and decide as to the fact of inhabitancy, yet we think the fair implication aris-

ing from a perusal of the whole statute upon the subject, is that the surrogate has power and is bound before admitting the will to probate or issuing letters to institute the inquiry and to decide upon the fact of inhabitancy. (Laws of 1837, chap. 460, §§ 4, 5, etc.)

As the surrogate is directed to inquire as to the names and places of residence of the *heirs* of the *testator*, the implication is a necessity that he must first inquire whether there was a testator. Within the meaning of this statute, there could be no testator if there were no deceased person, neither could there be any heirs of one who was then alive. The surrogate is to take proof of these facts where the testator died an inhabitant. (§ 1 of above cited act.) He must, therefore, as part of his statutory duty, inquire as to that fact of inhabitancy before taking the proof of the will.

Another statute authorizes the surrogate to issue subpœnas and take testimony in all matters material to any inquiry pending in his court. (2 Rev. S. 221, § 6.) The duty to investigate and decide upon the fact of inhabitancy is necessarily and naturally to be implied from the whole provisions of the statute relating to wills and their probate and such duty is to be performed before the will is admitted or letters issued. If no contest is made and there is no evidence upon the subject of the inhabitancy of the testator one way or the other, except the sworn allegation in the petition, I do not see why the surrogate may not rely upon the fact so stated. Whether, when the fact thus appears in the sworn petition addressed to the surrogate, such fact shall be resworn to by the petitioner or some one else upon an oath administered by the surrogate himself is matter which, as it seems to us, is not of a jurisdictional nature. The surrogate may regard the oath taken to the petition as sufficient *prima facie* evidence, although the statute does not in terms require the fact of inhabitancy to be stated in the petition. If it be so stated and sworn to and no evidence is offered on the other side and no issue raised as to the truth of the allegation in any manner or form, the decision of the surrogate should be regarded as conclusive, subject only to attack by a direct proceeding to review it. It might happen that where there is evidence *pro* and *con*, the decision would appear to be erroneous, and for that reason it ought to be reversed, but unless a direct attack be made upon it, the judgment should remain. This is upon the principle that the surrogate must decide upon some evidence the fact of inhabitancy before he can go further, and when he does so decide, although erroneously, the decision must stand until reversed.

The nature of a judgment which admits a will to probate is somewhat similar to that of one *in rem*. The *res* which the court takes into its hands for purposes of administration as representative of the state, is the property which was once possessed and owned by the deceased, who died an inhabitant of the state. Civilized states have for generations past recognized their obligations to specially protect

that kind of property. That obligation arises the moment the death occurs. The obligation assumed has been not only that of protection of the property, but also that of the distribution thereof to those who are living and who come within the rules of law governing the subject. How great the right of testamentary disposition should be and under what rules and regulations it should be permitted, are questions which have been differently decided by different nations and by the same nations at different times. Such rights are matters of municipal regulation. The right to inherit from, or to receive by gift, under the will of a deceased person is recognized and protected by the state, and from the fact of such recognition and protection the state owes the duty to see to it that the estate of a deceased person shall pass in accordance with the law which obtains in the state when the death occurs.

To prevent contention and to achieve a peaceful distribution of the estate under the rules of law, and to protect the rights of the creditors of the deceased, all civilized states have created tribunals of a judicial nature, whose function and duty it is to represent and exercise the powers of the state in the course of administration, and whose judgments determine the rights of the respective parties interested in the property as such rights are made to appear. The general jurisdiction over matters of this nature belongs to the state itself by reason of its general sovereignty. The practical exercise of the jurisdiction is vested in the so-called Courts of Probate or Surrogates' Courts.

In construing the language of the statute creating such courts, the fact must continually be borne in mind that the state is creating a tribunal or tribunals for the purpose of fulfilling its general obligations to all its inhabitants to protect and distribute, according to law, that which was once the property of one of their own number. That obligation is as broad as the sovereignty of the state itself. In the organization of the tribunals which are to exercise this jurisdiction, although the language of the statute may create a separate and distinct tribunal for each county in the state, and upon certain facts grant jurisdiction to one of them to the exclusion of all others, yet the facts upon which the jurisdiction is given to the court of one county instead of to another are merely incidental, partaking somewhat of the character of matters of procedure, the main fact being the actual death of an individual who, at the time of his death, was an inhabitant of the state. That is the jurisdictional fact, upon the existence of which is founded the duty of the state to protect and distribute the property according to law. Whether one or the other of the Surrogates' Courts in the various counties shall administer upon the estate, and thus fulfill the obligation which lies with the state itself, is a question which the legislature has provided for, and it depends, among other things, upon the fact of inhabitancy. This fact the surrogate to whom the matter is presented must decide, and if he decide

that it exists, and upon evidence which legally tends to support his decision, under such circumstances, we think, it ought to stand until reversed. This is believed to be the general rule. It is a matter of very trifling importance, except upon the mere question of convenience, which of such Surrogates' Courts shall take the proof as to the due execution of the will, and grant letters testamentary thereon. For the purpose of the orderly administration of the estates of deceased persons who died inhabitants of our state, the legislature has provided certain rules governing the subject, and has also provided certain conditions upon which the power of a surrogate to take jurisdiction of the matter depends; the subject-matter, however, of the jurisdiction is the administration of the estates of deceased persons, and over this subject-matter the state has granted to the surrogate of each county general jurisdiction. It is to be exercised upon various conditions, as was said by Church, Ch. J., in the second *Roderigas* case (76 N. Y. 316), dependent upon residence and the like, and the decision of the surrogate of one county, after a hearing of the parties upon the question whether the case calling for the exercise of the jurisdiction of his court, or the Surrogate's Court of some other county, exists or not, should be conclusive in all collateral proceedings. The jurisdiction to administer is bestowed upon each surrogate to the exclusion of all others, where the facts exist which are named in the statute. It is granted to him, however, out of the general and complete jurisdiction resting with the state over the entire subject of administration upon the estates of deceased inhabitants, and that general jurisdiction has been exercised by the state in the creation of a tribunal in each county for such purpose of administration, and when the question of jurisdiction arises before one of such courts where the deceased died an inhabitant of the state, and the right of administration attaches to the Surrogate's Court of some county, it must, in the nature of things, be decided by the surrogate before whom it comes, and being matter incidental only in its nature, the decision of the surrogate, founded upon some evidence, must be conclusive, even though erroneous, except upon a direct review. I am aware that much has been written by the courts of the various states upon these questions of jurisdiction of courts of probate and the conclusiveness of their judgments. Decisions both ways have been reached. Criticisms have also been made in regard to the decision of the first *Roderigas* case. It is not needful to refer to them, or to again renew the discussion which, as to this state, was ended by the decision in that case. The question is alluded to and the various cases cited in the first volume of the "Treatise on the American Law of Administration," by I. G. Woerner (§ 208 *et seq.*, and notes).

There is in the nature of things a broad distinction between the case of the granting of letters of administration upon the estate of one not in fact dead, and the granting of letters upon the estate of one who was, at the time of his death, an inhabitant of the state,

but not of the county where the will was proved, although the surrogate upon some evidence erroneously decided that he was.

It is quite unnecessary and wholly unprofitable to enlarge upon it here.

We do not intend by this decision to attack the principle or to shake the authority of the first *Roderigas* case (63 N. Y. *supra*),[1] for we simply say it is not necessary to here go so far as that case goes. In the opinions delivered in the two *Roderigas* cases will be found much of the learning on this subject, and a citation to most of the decided cases then reported and bearing upon the question.

In this record we think it appears that there was evidence enough to call upon the surrogate of New York to decide upon the question of the inhabitancy of Mr. Talmadge, and the surrogate, by admitting the will to probate and issuing letters testamentary, did in fact decide that Mr. Talmadge was, at the time of his death, an inhabitant of New York county, and this conclusion must, in such an attack as this, be a bar to a reopening of that question. This view of the main issue involved in this case calls for the affirmance of the judgment.

In *Bolton* v. *Jacks* (6 Robt. 166) a contrary result was arrived at by the Superior Court of New York in a very elaborate and learned opinion. With many of the views therein expressed as to the right to question a judgment rendered without jurisdiction we entirely concur, but for the reasons above given we think they are inapplicable to the particular facts of this case. . . .

We have considered the other questions raised by the appellants, but we do not think that any error prejudicial to them appears in the record.

The whole judgment should be affirmed, with costs.

All concur, except GRAY, J., taking no part.

Judgment affirmed.[2]

[1] This case is no longer law in New York. *Scott* v. *McNeal*, 154 U. S. 34; *Matter of Killan*, 172 N. Y. 547, 557.

[2] *Holmes* v. *Oregon & California R. Co.*, 5 Fed. 523; *Kling* v. *Connell*, 105 Ala. 590; *Irwin* v. *Scriber*, 18 Cal. 499; *Estate of Griffith*, 84 Cal. 107; *Tant* v. *Wigfall*, 65 Ga. 412; *Donahue* v. *Daniel*, 58 Md. 595; *McFeely* v. *Scott*, 128 Mass. 16 (under statute); *Johnson* v. *Beazley*, 65 Mo. 250; *Eller* v. *Richardson*, 89 Tenn. 575; *Burdett* v. *Silsbee*, 15 Tex. 604; *Fisher* v. *Bassett*, 9 Leigh 119 (*semble*), *accord*. *Miller* v. *Swan*, 91 Ky. 36; *Miltenberger* v. *Favrot*, 21 La. Ann. 399; *People's Savings Bank* v. *Wilcox*, 15 R. I. 258, *contra*. And see *Slate's Estate*, 40 Oreg. 349.

Administration granted in a state where the deceased did not reside and left no effects is void. *Insurance Co.* v. *Lewis*, 97 U. S. 682; *Thormann* v. *Frame*, 176 U. S. 350; *Perry* v. *St. Joseph, R. Co.*, 29 Kan. 420; *Thumb* v. *Gresham*, 2 Met. (Ky.) 306; *Hall* v. *L. & N. R. Co.*, 102 Ky. 480; *Moise* v. *Mutual Life Association*, 45 La. Ann. 736. *Appeal of Willetts*, 50 Conn. 330; *Record* v. *Howard*, 58 Me. 225; *Andrews* v. *Avory*, 14 Gratt. 229, *contra*. Compare *Hoes* v. *N. Y. N. H. & H. R. Co.*, 173 N. Y. 435.

On jurisdiction to establish a devastavit against an executor, see *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346.

NELSON *v.* BLINN.

197 Mass. 279. 1908.

KNOWLTON, C. J. The appellant was appointed the receiver of the estate of an absentee from the Commonwealth, under the R. L. c. 144, as amended by the St. 1904, c. 206. After due proceedings in the management and settlement of the estate of the absentee, more than fourteen years having elapsed since the time of her disappearance as found and recorded by the court, a petition for distribution of the estate was filed in the Probate Court, and after proper notice and regular proceedings a decree was made ordering a distribution in accordance with the prayer of the petition. The case is before us on an appeal, and the only question raised is whether the statute referred to is constitutional.

The appellant relies upon art. 10 of the Declaration of Rights, which guarantees to every individual protection in the enjoyment of his life, liberty and property, and upon the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law. As applied to a case like the present, the prohibition in the amendment just referred to is as broad as the general provision in the Constitution of Massachusetts.

The unanimous opinion of the justices of the Supreme Court of the United States upon a similar statute, in the case of *Cunnius* v. *Reading School District*, 198 U. S. 458, may be treated as a sufficient authority, except so far as the different provisions of the statutes modify the questions involved. That case arose upon a statute of Pennsylvania, whose constitutionality was sustained by a unanimous decision of the Supreme Court of that State, reported in 206 Penn. St. 469. In each decision a distinction was pointed out between those statutes which authorize a settlement of the estate of a deceased person, under which the proceedings are void and the whole jurisdiction gone if the person is in fact alive, and statutes like the present, in which a State undertakes to deal with property within its jurisdiction when its owner has abandoned it, or for some other reason cannot be found. Said Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in the case just cited, "It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a care taker and to vest present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the State must have some such power is manifest. The property is within its jurisdiction and under its protection. It is

not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding is unimpeachable. But if he is dead, so far as can be learned, though the death be not absolutely proved, yet the effect to the state is the same, there is property in its charge, without a recognized owner. It must have power to meet such a case, or one of its chief functions as a government must go unperformed." The subject is very fully and ably considered by Mr. Justice White in giving the opinion of the Supreme Court of the United States in the same case, and the legality and propriety of the exercise of this governmental right is established historically as well as by sound reasoning. In view of these decisions the case of *Carr* v. *Brown*, 20 R. I. 215, and *Clapp* v. *Houg*, 12 N. D. 600, so far as they present a different view, should not be followed.

In the fundamental principles upon which the law rests there is no difference between the statute in Massachusetts and that in Pennsylvania. Each alike makes a reasonable provision for notice. As the proceeding is in its nature *in rem*, a personal notice to the absentee, which in most cases would be impossible, is not necessary to its validity. The constitutionality of our statute was assumed by the parties and the court in *George* v. *Clark*, 186 Mass. 426, and in *Purdon* v. *Blinn*, 192 Mass. 387.

The only part of our statute that is not covered by the decision of the Supreme Court of the United States is that which relates to the distribution of the property. . As bearing upon that the language of Mr. Justice Mitchell in 206 Penn. St. 469, 475 is pertinent. He says: "But there must be a limit beyond which the State is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the State and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The State is not bound to have the regular and lawful use and ownership of property subjected to such restrictions and uncertainty. If a fair and reasonable provision is made for the protection of the owner in case of his reappearance the State has not exceeded its constitutional powers."

The statute in Pennsylvania provides that a distribution of the estate of the absentee may be made in proceedings commenced after he has been absent and his whereabouts have been unknown for seven years, and it would seem that the estate might be settled and the distribution ordered within a comparatively short time after the expiration of the seven years. Upon such distribution the distributees must give security, to be approved by the court, that they will refund the amounts received with interest, should the absentee in fact be alive; but if they are not able to give such security, the money is to be put at interest, and the interest paid only to the distributees until security has been given, or until "the court on appli-

cation shall order it to be paid to the person or persons entitled to it." Under this statute there is nothing to prevent the court from ordering the whole estate paid over to the distributees, without security, long before the expiration of fourteen years from the time of the absentee's disappearance. The principal difference between the two statutes is that, under this in Pennsylvania, the whole property might be distributed without security, if the court should order it, within a period that might not be more than nine or ten years from the disappearance of the absentee, while under our statute no distribution can be made before the expiration of fourteen years from his disappearance, at which time all his rights to the property are barred by the statute. This last is, of course, a statute of limitations. Viewed as such, if it is not unreasonable in the length of time which it gives an owner in which to recover his property within the jurisdiction of the State, it is not unconstitutional. *Call* v. *Hagger*, 8 Mass. 423. *Mulvey* v. *Boston*, *ante*, 178. One who wishes to preserve his right to property not in his possession must act with reasonable diligence in the assertion of his right. As to most kinds of personal property he is barred by our statutes at the expiration of six years from the time when he might have taken formal proceedings for his protection. A disseisin of him, continued for twenty years, deprives him of his real estate. As to property abandoned or left unclaimed or uncared for within the Commonwealth, the Legislature may well exercise the jurisdiction of the State to take it in charge and administer it, and may prescribe a reasonable time as a limitation of the right of the owner to reclaim it. The question how long a time must be allowed, in the interest of the owner, and in the interest of those claiming under him, as well as in that of the general public, is primarily for the Legislature to decide. Something might depend upon the internal condition of the State, as to the nature and density of the population, the kinds of business which are most followed, and other local considerations with which the Legislature would be familiar. In regard to such a kind of jurisdiction as is exercised under this statute, and the effect of long delay and uncertainty as to the ownership of property in the hands of a receiver, we cannot say that the Legislature might not properly enact that one's rights of property within our jurisdiction should be lost if he is absent for fourteen years without attempting to exercise them. In some respects this statute is more considerate of the rights of absentees than the statute of Pennsylvania which was held constitutional, while in other respects the other is more liberal. We cannot say that it was beyond the constitutional power of the Legislature to enact.

Decree affirmed.[1]

[1] Compare *Cunnius* v. *Reading School District*, 198 U. S. 458; *Clapp* v. *Houg*, 12 N. D. 600; *Carr* v. *Brown*, 20 R. I. 215; *Selden* v. *Kennedy*, 104 Va. 826.

In the absence of statute administration on the estate of a living person is void. *Scott* v. *McNeal*, 154 U. S. 34; 1 Woerner, Am. Law Adm. (2d ed.), §§ 208–213.

KNIGHT *v.* WHEEDON.

104 Ga. 309. 1898.

LEWIS, J. Lucy A. Seamans died a resident of Kentucky, and while living there executed a will conveying both real and personal property situated in this State. This will was attested by only two witnesses. The will was executed in conformity to the laws of the State of Kentucky and was duly probated in that State. Mrs. Emma W. Wheedon, the executrix named in the will, offered the same for probate in her petition to the ordinary of Pike county in this State where the property devised and bequeathed in the will is located, and produced a duly certified exemplification of the probate proceedings that were had in the State of Kentucky. The case was appealed to the Superior Court of Pike county. The plaintiff in error demurred to the petition for probate, upon several grounds, which demurrer was overruled. The only ground insisted upon here is, that the paper sought to be set up was not a will under the laws of Georgia, because it was attested by only two witnesses. This demurrer was overruled, and plaintiff in error excepted.

As a general rule, which is perhaps universal in its application, except where changed or modified by statute, the validity of the execution of a will conveying personal property depends upon the law of the place of the testator's residence at the time of his death; but as to a devise of real estate the *lex loci rei sitæ* governs. If, therefore, a will bequeathing personalty is executed according to the laws of the State where the testator resided, it is a sufficient bequest of such personalty, although it may not conform to the laws of the State where the personal property happens to be actually located at the time of the death of the testator. On the other hand, if such a will undertakes to devise lands in another State, the law of the State where the lands are located must be strictly followed in the execution of the will; otherwise it is no testament at all as to such realty. See Political Code, § 8; *Latine* v. *Clements*, 3 Ga. 426, 432; *Key* v. *Harlan*, 52 Ga. 476; 3 Am. & Eng. Enc. L. 630, 632, and numerous authorities there cited.

The only question remaining for consideration is, whether or not the legislature of this State has changed this general principle of law relating to the execution of wills. By an act approved December 24, 1886 (Acts 1886, p. 32), it is provided, that "any last will and testament made by a person competent to make a will under the laws of Georgia, resident and a citizen of any of the United States other than the State of Georgia, and which may be construed to dispose of real or personal property in this State, shall be admitted to probate in any county of this State where any of the property disposed of by said will may be at the time such probate is sought: *provided*, that said last will and testament shall have been in all respects executed

in accordance with the laws of the State in which he resided at the time of the execution; and *provided further*, that probate of said will shall have been made in solemn or final form in the State where the testator resided, and admitted to record as the last will and testament of the testator according to the laws of that State." The act then goes on to provide how such a will may be probated in this State. We do not think it necessary to consider the question as to whether or not it was the legislative intent by this act to change the rule with reference to the execution of foreign wills. To say the least of it, such intention is by no means clearly manifested from the act itself. This law was evidently superseded by the act approved November 13, 1889 (Acts 1889, p. 190). There it is clearly manifest from the first section of the act that foreign wills conveying realty in this State can not be admitted to probate here unless attested according to the laws of this State, but such will conveying personalty in this State can be admitted to probate here if attested "as are wills of personal estate in the State where the testator resides." The act of 1889, however, has been in turn superseded by the act approved December 17, 1894 (Acts 1894, p. 102), now embodied in sections 3298 *et seq.* of the Civil Code. It is insisted by counsel for the defendant in error, that this act of 1894 changes the former rule upon the subject, because section 4 of the act (Civil Code, § 3301) expressly provides for probate of a foreign will upon production of an exemplification of the probate proceedings duly certified, and that it can only be resisted as other judgments of a sister State may be attacked. We must construe that section in connection with what precedes. By section 2 (Civil Code, § 3299) it is provided that if any realty in this State is devised or bequeathed by the terms of any foreign will, such foreign will may be admitted to probate in any county in this State in which such property is situated, *provided* such foreign will is in writing, attested and executed according to the laws of this State. The next section provides that such foreign will may be admitted to probate by testimony in open court or by interrogatories, etc. Then follows the section that "if said foreign will has been admitted in common or solemn form in the State in the United States of which the testator was a resident at the time of his death, it may be admitted to probate in like common or solemn form in this State, upon production of an exemplification of the probate proceedings," etc. What is meant by the terms "said foreign will" in the last-named section? Evidently, the will referred to in the preceding provisions of the act; that is, a will executed by persons residing out of this State, which *as to realty* must be "*attested and executed according to the laws of this State.*" The entire act should be so construed as that all its provisions will stand, unless it is impossible from the terms used to reconcile the different provisions of the act. To place the construction on section 4 insisted upon by counsel for the defendant in error would amount to a repeal of section 2, which

provides, in effect, that a foreign will as to a devise of realty can not be probated in this State unless executed according to its laws. The purpose of the act of 1894 was not to change the general rule of law in relation to the execution of wills, but it was simply to provide an additional method of admitting to probate in this State wills executed and proven in another jurisdiction. The act simply changes the law of evidence on the subject. We therefore think that the will in question, being attested by only two witnesses, is inoperative so far as it undertakes to devise lands in this State; but inasmuch as the will bequeaths personal property and has been executed according to the laws of the State of the residence of the testatrix, we think it should have been admitted to probate as a muniment of title to such personalty; and the court therefore did not err in overruling the demurrer to the petition.

Judgment affirmed. All the Justices concurring.[1]

RACKEMANN, EXECUTOR *v.* TAYLOR AND ANOTHER.

204 Mass. 394. 1910.

KNOWLTON, C. J. The fundamental question in this case is whether the petitioner for the probate of the will of Caroline E. Johnson, late of the city of New York, State of New York, deceased, shall be given an opportunity to establish the will, if he can, in the courts of Massachusetts, before it has been allowed in the domicil of the testatrix. The following facts, among others, are agreed:

The testatrix died at her home in New York, which was the place of her domicil, on April 24, 1908. She had not been domiciled in Massachusetts since her marriage in 1847. For sixty years she had resided in the State of New York. For the last eighteen or twenty years of her life she spent her summers in Newport, Rhode Island. For more than thirteen years before her death she had not been within the State of Massachusetts. At the time of her death she owned two parcels of real estate in the city of New York, whose value was between $450,000 and $600,000. She had a deposit of $600 in a bank there. She owned stocks in corporations, and bonds, most of which bonds were registered, whose total value was about $250,000, and these were in the custody of her nephew and agent Ellerton P. Whitney, in a safe deposit vault in Boston. He had held and managed them as her agent for twenty years, and they remained in his custody until the appointment of special administrators of the estate, when they were transferred to their possession. Some of these corporations were organized under the laws of Massachusetts, and some of them under the laws of other States. At the time of her death, she had on

[1] Many authorities are collected in 9 Am. & Eng. Ann. Cas. 422 note; 2 L. R. A. N. S. 408 note.

deposit more than $15,000 in the New England Trust Company of Boston. She also had a power of appointment by will, over a trust fund held by trustees appointed by the Probate Court for the County of Suffolk, under the will of Joseph Whitney, late of Boston. This fund then amounted to about $600,000, and consisted of stocks and bonds, real estate in Massachusetts, and an equity in real estate in New York, of the value of about $60,000. Her only heirs at law are her three daughters, who reside in New York. The other possible beneficiaries under the alleged will are twenty-one in number, and they all reside near Boston. The executors named in the will are her nephew, Ellerton P. Whitney of Milton, her daughter, Mrs. Emmet of New York, and the petitioner, a lawyer in Boston. Mrs. Emmet declined to join in the petition, and Ellerton P. Whitney declined to serve as executor. The three daughters of Mrs. Johnson appeared specially in the Probate Court before any hearings were had to prove the will, and objected to the presentation of the will for original probate in this jurisdiction, for the reason that the domicil of the testatrix was in New York. They asked that the proceedings be dismissed or continued until the case should be tried in the Surrogate's Court for the County of New York. This petition was denied, and the special appearance for the daughters was afterwards withdrawn, and a general appearance was entered for Josephine W. Taylor, one of the daughters, who filed a motion in writing, before the hearings were held, that the proceedings in the Probate Court be continued to await the result of proceedings then pending in the Surrogate's Court for the County of New York. The proceedings in New York were begun at the instance of the three daughters, by a person claiming to be a creditor of Caroline E. Johnson to the amount of $200, and in these proceedings he petitioned for the probate of the will. The daughters opposed the probate, and Mr. Rackemann, the present petitioner, filed a protest against any proceedings in the State of New York. This motion to continue was denied in the Probate Court.

After a hearing and the examination of witnesses in the Probate Court, the will was admitted to probate, and Josephine W. Taylor and Fanny L. Johnson appealed, giving as one of the reasons of appeal that Caroline E. Johnson had her domicil in the city and State of New York, and that probate proceedings concerning any will alleged to be made by her should first have been had in that jurisdiction. The alleged will was executed in Newport, Rhode Island, but ever since its execution, until it was filed in the Probate Court, it has remained in the custody of Mr. Rackemann. When Mr. Rackemann presented the petition in the Probate Court he knew that one or more of Mrs. Johnson's daughters objected to the probate of the alleged will, and intended to contest the allowance of it. The alleged will was drawn in Boston. Upon the petition of the three daughters, before the allowance of the will in the Probate

Court, special administrators were appointed to take charge of the property in Massachusetts.

After the entry of the appeal in the Supreme Judicial Court, two of the daughters, upon the suggestion of the presiding justice, filed a motion that the petition for the probate of the will be dismissed without prejudice to the right to petition for probate later, if occasion should arise therefor, alleging as reasons for their motion the facts stated above. They also filed a motion for a stay of proceedings until the validity of the will should be determined in the domicil of the alleged testatrix.

The case is before us upon a report of the justice upon questions raised by the foregoing facts.

It is a familiar rule of law that the right of succession to the estate of a deceased person, whether he leaves a will or dies intestate, depends upon the law of his domicil. The settlement of his estate and the disposition of his property are to be made in accordance with the law of that place. If he owns real estate in another State or country, that is, of course, subject to the local laws of the place where it is situated, and no owner can take or hold it otherwise than in conformity with those laws. But these laws are not intended to interfere with the reasonable right of control and disposition of its owner, so far as to have a situs for the purposes of disposition by will, or by succession under the statutes of distribution in the place of his domicil. The primary proof of a will and the primary administration of an estate, if the owner dies intestate, should be where he had his domicil. If he has property in another State or country, it may be necessary to prove the will or to take out administration there, either for the purpose of obtaining and collecting the property, or for the security of local creditors, or the protection of rights of the State to receive taxes, or of residents of the State who ought to get what they are entitled to receive from the estate without being obliged to follow the property into another jurisdiction. But such probate of a will or such administration of an intestate estate is always merely ancillary. It is not for the purpose of establishing rights of succession, whether under a will or otherwise. Those are to be established in the courts of the State or country where the deceased person had his domicil. The strictly ancillary character of such proceedings has been recognized by many decisions of the courts of our own State, as well as of courts elsewhere. *Selectmen of Boston* v. *Boylston*, 2 Mass. 384. *Richards* v. *Dutch*, 8 Mass. 506. *Stevens* v. *Gaylord*, 11 Mass. 256, 263. *Jennison* v. *Hapgood*, 10 Pick. 77, 100. *Dawes* v. *Head*, 3 Pick. 128, 141, 145. *Crippen* v. *Dexter*, 13 Gray, 330. *Shannon* v. *White*, 109 Mass. 146, 148. *Shannon* v. *Shannon*, 111 Mass. 331, 334. *Talbot* v. *Chamberlain*, 149 Mass. 57. *Bowdoin* v. *Holland*, 10 Cush. 17. *Frothingham* v. *Shaw*, 175 Mass. 59, 63. *Wallace* v. *Wallace*, 2 Green Ch. 616, 622. *Hyman* v. *Gaskins*, 27 N. C. 267, 274. *Mills* v. *Fogal*, 4 Edw. Ch. 559. *Manuel* v. *Manuel*, 13 Ohio St. 458.

Stark v. *Parker*, 56 N. H. 481, 485, 487. *Morris* v. *Morris*, 27 Miss. 847. It was said in *Prescott* v. *Durfee*, 131 Mass. 477, 478, that "the object of appointing an administrator [in another jurisdiction than that of the domicil of the testator] is not to determine the rights of parties interested in that estate, but to have a legal representative of the estate of the deceased within the Commonwealth, against or through whom those rights may be asserted." In *Talbot* v. *Chamberlain*, *ubi supra*, the court said: "Unless it [the domicil] was in Iowa, the courts of that State did not have, and the courts of Massachusetts did have, jurisdiction of the original probate of his will." The subject is discussed very fully in *Parsons* v. *Lyman*, 20 N. Y. 103. In the *Matter of Cameron*, 47 App. Div. (N. Y.) 120, 126, affirmed on appeal in 166 N. Y. 610, it was held that the alleged will of a person domiciled in New York, which had been proved in Illinois on the ground that he left property there, could not be allowed in New York on the proof furnished to the court, the will itself being retained in Illinois. An administrator was appointed to settle the estate as intestate. The judges were unwilling to have the laws of New York (to use their language) "circumvented by the practical administration of the estate under a will which, if valid, ought to be established according to our laws, and if not valid, should not be made effectual by indirection." In *Davis* v. *Upson*, 230 Ill. 327, the same alleged will was before the court, and the judges said: "If the decision of the court of the domicil of a deceased person does not control in the matter whether the deceased died testate or intestate there must necessarily result a multitude of decisions upon that question, and if a devisee may carry a will from State to State and present it for probate in each State where the decedent had a debt due him at the time of his death, until he can find a State under the laws of which it can be admitted to probate, great confusion in the settlement of estates would follow." In *Mills* v. *Fogal*, 4 Edw. Ch. 559, in dismissing a bill asking for a construction of a will of a person whose domicil was in Connecticut, the court said: "It is very obvious that it was the duty of the executors, in the first instance, (unless they had chosen to renounce) to have gone with this will for probate before the proper officer or court in Connecticut and there asked for letters testamentary upon it as a will of personal estate. If they succeeded in getting it admitted to probate . . . they should then and not till then have come to the surrogate of the city and county of New York for letters founded on the probate in Connecticut. . . . That question (the question of construction) the widow has a right to have determined in Connecticut, where her husband lived and died; and if the executor will not produce the will there for probate, so as to give her an opportunity for meeting it she can apply for letters of administration here, so as to be authorized to look after and sue for and possess herself of the personal estate within this jurisdiction."

There is nothing inconsistent with this doctrine in the decisions in

Massachusetts. Indeed, they are in harmony with it. Our statutes are founded on the same doctrine. R. L. c. 143. By § 1 of this chapter, the estate of a deceased person who was an inhabitant of another State or country, if "found here shall, after payment of his debts, be disposed of according to his last will, if he left any duly executed according to law; otherwise his real property shall descend according to the laws of this Commonwealth, and his personal property shall be distributed and disposed of according to the laws of the State or country of which he was an inhabitant." By the next section, payment of his debts from his estate is secured to creditors in this Commonwealth, and the residue of the estate may be distributed and disposed of as provided in the preceding section, by the Probate Court; or, it may be transmitted to the executor or administrator in the State or country of which the deceased person was an inhabitant, to be there disposed of according to the laws thereof. Every part of the chapter recognizes the law of the domicil of the deceased person as controlling in all matters pertaining to succession to his property. If the Probate Court should assume to distribute and dispose of the personal estate according to his last will, and if there was a question of construction of the will upon which the courts of the different States differed, the Probate Court would be bound by the construction of the courts in the State of his domicil.

The same doctrine lies at the foundation of the R. L. c. 136, §§ 10–12, in regard to the admission to probate of a will which has been proved and allowed in another State or in a foreign country, upon the production of an authenticated copy of the will and of the probate thereof. It has been held that similar statutes in other States have reference only to the record of the probate in the place of the testator's domicil. *Wallace* v. *Wallace*, 2 Green Ch. 616. *Manuel* v. *Manuel*, 13 Ohio St. 458. When we consider § 10, in connection with § 12, by which it appears that the settlement of estates under these sections is to be "in the manner provided in chapter one hundred and forty-three, relative to such estates," it seems that these provisions are intended to apply only to records and laws affecting wills in the domicil of the testator, and that this kind of administration under a will is strictly ancillary.

If a will should be presented and proved in a State other than that in which a testator had his domicil, and if, afterwards, upon proceedings for the proof of the same will in the State of his domicil, it should be disallowed and his estate should be held to be intestate, we should have the strange anomaly of the same instrument being upheld as a will in one State and set aside as not a will in another State, and there would be two inconsistent methods of disposing of his property. The will proved in the ancillary proceedings could have no effect except upon the property within the State, and as to that, it should have no effect, after the payment of debts and proper charges against the estate, that should prevent the disposition of the

personal property according to the law of the domicil of the deceased person. Ordinarily, unless there is some special reason to the contrary, the residue should be transmitted to the administrator in the place of the domicil. What would be done in a case of such conflict we need not determine. The law ought to be so administered as to prevent such conflicts. While there would no doubt be power in the court, in the case supposed, to dispose of the property within this jurisdiction according to the terms of an instrument which it had found to be a will, although the courts of the State which had primary jurisdiction of it had found it not to be a will, it would seem that the true theory of administration would call for a disregard of the ancillary proceedings, in reference to the succession to the property, and for a transmission of the residue to the State where primary administration was going on.

[The learned judge then considered *Putnam* v. *Pitney*, 45 Minn. 242, and *Hyman* v. *Gaskins*, 27 N. C. 267 and proceeded as follows: — ED.]

In the present case, no reason appears for presenting the will for probate here before it was passed upon in the State of New York, unless it was to secure an adjudication in Massachusetts which would settle the succession to the property of the testatrix in this State. Perhaps it was expected to go further, and, if a favorable decision was obtained in our courts, to claim an estoppel in New York against the heirs at law who were parties litigant in Massachusetts. Such a purpose, if it existed, was contrary to the true theory of the law. The heirs at law of Mrs. Johnson, and all persons interested under the alleged will, are entitled to have the instrument primarily considered, and its validity or invalidity finally determined, by the courts of New York. It is the duty of the executor, unless he declines his appointment, to present it for probate there. It would be contrary to principles of comity, as well as an interference with the rights of the heirs at law, for the Probate Court to retain jurisdiction of this petition under the facts that appear in the present case.

We do not question that, in a sense, the court has jurisdiction, that is, it has such control of the property in this Commonwealth that it is in its power to entertain a petition for the probate of the will before it is considered by the courts of New York. It will be the duty of the court, upon application, so to deal with this estate as to protect the rights of creditors in this Commonwealth, if there are any, and to secure to the treasurer of the Commonwealth such inheritance taxes as should be paid, and otherwise to protect local interests; but there is no occasion to proceed with this petition in the present aspect of the case. Special administrators have been appointed, who will take care of the property. If the will is proved in New York, it doubtless can be proved here with little delay and with slight expense. The will itself, which is now on file in the Probate Court, should be in New York, subject to the control of the court there during the proceedings for the probate of it. This is a

case in which the court, upon the facts before us, should decline to exercise jurisdiction. We do not doubt that there may be cases in which the court, upon the facts before us, should decline to exercise jurisdiction. We do not doubt that there may be cases in which, if it seemed necessary for the protection of parties, the court properly might take jurisdiction of such a petition, although the will had not been presented for probate in the State of the domicil of the testator. In such cases the petition should set forth the facts that call for the exercise of the jurisdiction. But this is one of that class of cases in which, if the court has power — and in that sense has jurisdiction — it ought not to exercise its power, having regard to practical considerations affecting the rights and interests of the parties, and also to the comity which should be maintained between the courts of different States. The case is analogous to a class of cases of which *Smith* v. *Mutual Life Ins. Co.* 14 Allen, 336, 343, is one, in which Mr. Justice Wells said: "But aside from the question of power depending on the right of jurisdiction, we regard it as within the province of this court, sitting as a court of equity, in its discretion, to decline to exercise jurisdiction in such cases; referring parties to the tribunals of the State upon whose laws their relations and rights peculiarly depend, and where alone they can be effectually and properly administered." See also *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349, 353; *Kimball* v. *St. Louis & San Francisco Railway,* 157 Mass. 7; *National Telephone Manuf. Co.* v. *Du Bois,* 165 Mass. 117.

We think that, upon the facts shown, the Probate Court should have declined to take jurisdiction of the case, and should have dismissed the petition, without prejudice to the right of persons interested to petition later for the probate of the will, if occasion should arise.

The jurisdiction to allow the probate of a foreign will for ancillary administration exists only when the will has been proved in the State of the domicil of the testator, unless special reasons are set forth for an application for the ancillary probate of it, without waiting longer for administration in the courts of that State.

Upon an appeal from the Probate Court to the Supreme Judicial Court, the statute gives a very large power to the appellate tribunal to "enter such decree thereon as the Probate Court ought to have entered, . . . or make any other order therein, as law and justice may require." R. L. c. 162, § 23.

We are of opinion that the petition should be dismissed without prejudice.

So ordered.[1]

[1] Simple contract debts are assets where the debtor resides. *Arnold* v. *Arnold,* 62 Ga. 627; *Kohler* v. *Knapp,* 1 Bradf. Sur. 241; *Abbott* v. *Coburn,* 28 Vt. 663. The same is true of bills of exchange and promissory notes. *Wyman* v. *Halstead,* 109 U. S. 654; *Slocum* v. *Sanford,* 2 Conn. 533; *Chapman* v. *Fish,* 6 Hill, 554. *Goodlett* v. *Anderson,*

THORBURN *v.* GATES.

225 F. R. 613. 1915.

At Law. Action by Robert H. Thorburn against Dellora R. Gates, as executrix. On motion to quash service of summons. Granted.

Motion to squash the service of a summons in an action at law under section 7 of the Sherman Act. The defendant is executrix of two deceased persons, who are charged jointly with the wrongful acts which resulted in damage to the plaintiff. She is a resident of Texas. The two decedants were Texans by residence and citizenship. She was appointed executrix by the proper Texas courts, who had probated the wills and are assuming administration of the two decedent estates. The summons was served in New York while the defendant was actually sojourning there. Section 1836a of the Code of Civil Procedure of New York is as follows:

"An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section 2704 of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed."

LEARNED HAND, District Judge (after stating the facts as above). Section 7 of the Sherman Act, in providing that the defendant may be served where "found," did not intend to extend the scope of the process of this court. It meant to remove the existing limitations upon the venue of actions between diverse citizens and to permit the plaintiff to sue the defendant wherever he could catch him with a process good where it was executed. In this respect it differs from the provisions of the Clayton Act (Act Oct. 15, 1914, c. 321) § 12,

7 Lea. 286, *contra*. A judgment debt is assets where the judgment is recorded. *Adams* v. *Savage*, 2 Ld. Raym. 854. But see *Morefield* v. *Harris*, 126 N. C. 626; *Swancy* v. *Scott*, 9 Hump. 327.

A specialty is assets where it is found. *Beers* v. *Shannon*, 73 N. Y. 292; *Daniel* v. *Luker*, Dyer 305 a; *Att'y. Gen'l.* v. *Bouwens*, 1 H. & H. 319; *Gurney* v. *Rawlins*, 2 M. & W. 87. Shares of stock have locality where the stock-book is kept. *Arnold* v. *Arnold*, 62 Ga. 627; *Murphy* v. *Crouse*, 135 Cal. 14; *Richardson* v. *Busch*, 198 Mo. 174. Compare *Russell* v. *Hooker*, 67 Conn. 24.

38 Stat. 736, which gives a wider scope to the process itself. The validity of the service of this process, therefore, gains nothing from the fact that the action arises under section 7 of the Sherman Act, but is to be judged quite as though it had been an ordinary civil action before the venue of suits between diverse citizens had been limited to the districts of the parties' residence.

Everybody agrees that without the aid of a statute a foreign executor might not be sued outside of the territory of the sovereign who granted his letters. This was already so well established in 1841 that Mr. Justice Story thought it unnecessary to cite much authority upon the point. *Vaughan* v. *Northrup*, 15 Pet. 1, 5, 10 L. Ed. 639; *Lewis* v. *Parrish*, 115 Fed. 285, 53 C. C. A. 77. The doctrine implies that the devolution of both rights and obligations, effected by the decedent's appointment and the grant of letters, is not regarded as intended for more than purposes of local administration and distribution. A gift *causa mortis*, a specific bequest after assent by the executor, an inherited freehold, a devise, each of these gives a title which will be recognized in other jurisdictions, because they are intended to have such an effect where they occur, and other states recognize the legal results within their own borders of what has taken place elsewhere. Such might have been equally well the view taken of the rights or obligations of the executor. As *hæres factus* of the Roman law, from whom he is descended, he might have had the same status as the heir at law actually obtained, and the title and obligation cast upon him might have been regarded as effecting a substitution to be recognized everywhere. Indeed, the executor has title, and the judgment against him was always regarded as personal (*Stacy* v. *Thrasher*, 6 How. 44, 60, 12 L. Ed. 337), even though the executor had the defense of *plene administravit*, and though his actual liability was upon the theory that he had assets in his hands, or had committed a devastavit. Had it not been for the interposition of the ordinary, it is possible that an executor might have become an heir somewhat as the heir at law; but since the Ordinary assumed always to grant letters of administration, the whole execution of the office became in some sense a public duty, finally conceived as resting wholly in the hands of the state which first undertook it. The unwillingness of other states to entertain such suits seems to be explicable only upon this interpretation of the grant of letters.

I therefore regard the doctrine as having for its necessary corollary that the whole subject of administration is *in rem* (*Jefferson* v. *Beall*, 117 Ala. 136, 23 South. 14, 67 Am. St. Rep. 177), and that the executor is only an official charged with the duties of management and distribution, regardless of whether he be vested with title or whether the obligation to pay debts be personal. These are perhaps concessions to his historical evolution, which have now ceased to indicate existing notions. Section 1836a of the Code of Civil Procedure of New York must be read in the light of these general ideas regarding

the status of executors. No doubt the state of New York, as respects goods situated within its own jurisdiction, might provide that an executor appointed elsewhere should be its own representative, and that process served upon him within its own borders should be effective to determine the disposition of all such goods. *Stacy* v. *Thrasher*, *supra; McLean* v. *Meek*, 18 How. 16, 15 L. Ed. 277. Yet if it attempted to go further than this, to take any steps towards the disposition of decedent's goods situated elsewhere and under the existing administration of another state, it would violate the common understanding respecting such matters and expose itself to the disregard of its judgments by the state which had appointed the executor and assumed the direction of his official conduct. Moreover, since the fourteenth amendment, the assumption of such a jurisdiction which conflicted with the exclusive authority of another state over a matter within its jurisdiction would itself be disregarded at the outset, at least in a federal court; nor would the executor be left to the assertion of the invalidity of such proceedings, when it was presented for execution or as evidence. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Dewey* v. *Des Moines*, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665; *Goldey* v. *Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

Section 1836a may be construed as intended for no more than to open the courts of the state to litigation in those cases where the law of the state appointing the executor authorized a foreign action; but in that case the validity of the process would be wholly dependent upon a condition of the law of Texas, which does not in fact exist. In so far, however, as without the authority of Texas, New York should attempt to adjust the obligations of the executor as such, and to make any final determination of his obligations in the distribution of assets already in process of administration in Texas, its act would necessarily be *brutum fulmen* in its result, and unconstitutional in its inception. Nor, indeed, is it in this instance possible to construe the section as intended to affect only goods now or hereafter within the jurisdiction of New York, as suggested above, because the language of the act is not apt to express such a distinction, and, in the absence of some authoritative interpretation by the Court of Appeals of New York to that effect, no such construction should be placed upon it. Since, however, an interpretation may be placed upon the statute which is consonant with its constitutionality, that interpretation should be chosen, and the statute read only as opening the courts of New York to suits against executors in those cases where the law of the domiciliary state allows it.

I have found only one decision upon such a statute, and that is the case of *Craig* v. *Toledo, Ann Arbor & North Michigan R. R. Co.*, 2 Ohio N. P. 64, which is to the contrary. However, this decision does not pass upon the validity of the act in respect of its extraterritorial effect, but only goes so far as to hold that the state might determine in what cases a foreign executor might be sued, leaving for

further determination the extent to which the judgment would be effective. That may well be true in Ohio; yet, as I have said, I hardly think that it can be supposed in the case of the New York Code, which contains full provisions for ancillary administration, that the suit authorized against foreign executors under section 1836a was only intended as an incident to ancillary administration. In any case I do not feel disposed to follow that case, if it is to be interpreted more broadly.

Two objections may be raised to this disposition of the motion: First, it may be suggested that a federal court does assume jurisdiction over the determination of suits against executors, though it will leave to the state courts of probate the actual enforcements of the decrees which result. In answer it must be remembered that a federal court is not the court of an independent state, and that in any event it does not attempt to obtain jurisdiction outside of the state in which the executor is appointed. The Constitution, in giving to federal courts jurisdiction over controversies between diverse citizens by sovereign power, gives an authority *pro tanto* over domestic administration which does not exist between independent states. It might, indeed, have gone further and made effective its own decrees, assuming the total administration of decedents' estates, except for the fact that this might involve purely domestic matters, and perhaps because it had no machinery.

The second supposed difficulty is practical, and arises from the fact that an absentee executor might remain inaccessible to the control of the state which appointed him. This question, however, goes only to the power of the state, which has assumed administration of the decedent's assets, to secure an efficient administration, and cannot be the excuse for the assumption by another state of those functions. I do not forget those cases where the executor, having assets in his possession, has repudiated the authority of his own state and taken them out of its power. *Bergmann* v. *Lord*, 194 N. Y. 70, 77, 86 N. E. 828; *Lewis* v. *Parrish*, 115 Fed. 285, 53 C. C. A. 77. Those cases are to be interpreted upon the theory that the executor, having abandoned his obligations and being disposed to assume mere personal dominion over the assets, is lost to the state which originally assumed jurisdiction, and ceases to be effectively subject to any law. He becomes, as it were, an outlaw, who may be brought to account and compelled to do justice personally wherever he may be found.

I have assumed throughout that section 1836a of the Code of Civil Procedure may give jurisdiction to a federal court. This question need not be decided, because, even assuming it to be determined in the plaintiff's favor, it will not serve to protect the process here in question. Motion to quash is granted.[1]

[1] See *Dewey* v. *Barnhouse*, 75 Kan. 214; *Craig* v. *Toledo, R. Co.*, 2 Oh. N. P. 64. Cases on the rights and liabilities in foreign jurisdictions of a personal representative appointed at the domicil of the deceased, and on ancillary administration in general are collected in 3 Beale, Cas. on Conflict of Laws, pp. 97–182.

SECTION II.

NECESSITY OF PROBATE AND ADMINISTRATION.

GRANGER v. HARRIMAN.

89 Minn. 303. 1903.

BROWN, J. Action to recover upon a promissory note, in which judgment on the pleadings was ordered for defendant by the trial court, and plaintiff appealed from an order denying a new trial.

The facts are as follows: The promissory note upon which the action is founded was given by defendant to James Morrison March 10, 1887. Morrison died intestate in 1889, leaving, him surviving, a widow and two children, his sole heirs; one of the children being plaintiff in this action. His widow died in 1890. No administration of the estate of either was ever had, the two children, the only heirs, having amicably divided all property belonging to the estate between themselves, there being, as alleged in the complaint, no debts to pay, and hence no necessity for the appointment of an administrator. In the division of the property the promissory note in question was set apart to plaintiff, and she claims title and the right to recover thereon by reason of such division and settlement. These facts all appear from the complaint.

When the cause was called for trial, plaintiff conceded that no administration of the estate was ever had or attempted, and the trial court, on motion, ordered judgment on the pleadings for defendant. The court was guided in this on the theory that personal property of a deceased person passes to his personal representative, the administrator, and that the only method by which the rights of creditors or third persons can be protected, and a perfect title to the estate pass to the heirs, is an administration of the estate in the manner provided by law. It is true that personal property of a person dying intestate passes to his personal representative, but the title and right acquired by the latter is a qualified one, and for the purposes of administration only. The administrator is charged with the duty of collecting the effects of his intestate and paying and discharging the debts chargeable against the estate, and, when that is fully accomplished, delivering the remainder of the property, if any, to the heirs. Subject to this right of possession and qualified title, the property descends direct to the heirs, and no final decree of the probate court is necessary where those entitled to the estate agree upon a division of the same. The substantial facts accomplished by the administration are the payment of debts and the distribution of the residue of the

property. So that, if there are no debts, and a division of the property be amicably made by those entitled to it, nothing remains for an administrator to act upon. Many of the authorities sustain the right of the interested parties in such cases to dispense with an administration, even before the time limited for creditors to appear and present their claims, by paying all debts, or showing that none existed, and distributing the property among those entitled to it. *Foote* v. *Foote*, 61 Mich. 181, 28 N. W. 90; *Glover* v. *Hill*, 85 Ala. 41, 4 South. 613; *Akin* v. *Akin*, 78 Ga. 24, 1 S. E. 267; *McCracken* v. *McCaslin*, 50 Mo. App. 85; *Roberts* v. *Messinger*, 134 Pa. St. 298, 19 Atl. 625; *Pratt* v. *Manhattan*, 47 La. An. 855, 17 South. 341.

Of course, the best evidence that there are no debts against a deceased person's estate is the fact that an administrator has been appointed, notice to present claims duly given, and a proper probate of the estate had in accordance with the law. But whether the nonexistence of such debts might not be shown by other proof prior to the time fixed by the statutes for their presentation to the probate court, we need not determine, for it is clear that, where the claims of creditors are barred by the statute of limitations because not presented to the probate court within the time limited for that purpose, the heirs entitled to the estate may dispense with the formal administration by an amicable settlement of their rights and the distribution of the property.

Such is the case at bar. Morrison, the payee of the note, died in 1889, and no claims appear ever to have been presented to the proper tribunal for allowance, and the heirs have settled their differences, and divided the property of the estate between them. Section 4514, G. S. 1894, provides that no claim against a decedent shall be a charge against or a lien upon his estate, unless presented to the probate court, as therein provided, within five years after the death of such decedent. The payee in the note in suit died over ten years prior to the commencement of the action, and all claims against his estate were then forever barred. It is no answer to say that no proceedings were ever commenced before the probate court, and no opportunity given to present claims, for, if the next of kin neglect to apply for an administration, creditors, or others interested in the estate, may do so; and, if creditors permit the estate to go unadministered for the period of five years from the death of the intestate, their claims are as effectually barred as though an administrator had been appointed and they had failed to present them for allowance. This view is sustained and strengthened by the statute providing for a final decree of the probate court in such cases, where no administration has been had, upon the application of the heirs, and notice to interested parties. The statute was sustained, as to a final decree of real estate, in *Fitzpatrick* v. *Simonson Bros. Mnfg. Co.*, 86 Minn. 140, 90 N. W. 378.

So that, as there were at the commencement of this action no valid debts against the estate, and the heirs have divided the property belonging thereto, plaintiff acquired good title to and may maintain the action upon the note set apart to her; and the order appealed from must be reversed. It is due to the learned trial court to say that this feature of the case does not appear to have been presented to him, but the point was distinctly made in this court, and we are required to pass upon it.

Order reversed, and a new trial granted.[1]

[1] *Robertson* v. *Robertson*, 120 Ind. 333; *Jester* v. *Gustin*, 158 Ind. 287; *Brown* v. *Baxter*, 77 Kan. 97; *Walworth* v. *Abel*, 52 Pa. 370; *Weaver* v. *Roth*, 105 Pa. 408 (*semble*); *Hurt* v. *Fisher*, 96 Tenn. 570; *Patterson* v. *Allen* 50 Tex. 23; *Babbitt* v. *Bowen*, 32 Vt. 437, *accord*. And see *Chisholm* v. *Crye*, 83 Ark. 495 (statute); *Demmons* v. *Booker*, 128 Ga. 83 (statute); *Foote* v. *Foote*, 61 Mich. 181; *Powell* v. *Pennock*, 181 Mich. 588; *Brobst* v. *Brobst*, 155 N. W. (Mich.) 734; *Jones* v. *Herbert*, 77 N. H. 282. *Conklin* v. *Alabama Ry. Co.* 81 Miss. 152, *contra*. Authorities are collected in 112 Am. St. Rep. 729 note; 22 L. R. A. N. S., 454 note.

SECTION III.

APPOINTMENT OF EXECUTORS.

REX *v.* RAINES.

1 Ld. Raym. 361. 1698.

PER HOLT, C. J. Wills and testaments are of ecclesiastical conusance, not by force of the civil or canon laws (for they bind no farther here than as they have been received here), but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distribution were prohibited by the King's Bench until the 22 & 23 Car. 2, *c.* 10, made them lawful. Dr. Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though the refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly which he is going to execute), yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right to require collateral security. Then the testament will continue in force, the ordinary cannot grant administration *cum testamento annexo,* and so there will be a failure of justice, nobody being capable to sue the testator's creditors. One half of what one finds in Linwood is not the law of the land. And as to the case of religious persons, objected out of Linwood, he said, that if a monk may be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior, by his leave given, is become security; and if the monk commits a *devastavit,* the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And TURTON, Justice, agreed with HOLT, Chief Justice, *in omnibus.* But ROKEBY, Justice, seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal.

And he said, that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr. Waller to certify the King's Bench, by producing precedents, whether the practice had been in the Prerogative Court to take caution in such case. At which day no precedent of it being shown, nor satisfaction thereof given to the court, HOLT, Chief Justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory *mandamus* ought to be granted in this case; because the ecclesiastical court cannot require caution in this case. 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. 2. The executor has a temporal right, of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster Hall. 3. There are no precedents in the canon law to warrant this, and the practice has been always contrary. And if any cases happen, in which equity may be requisite, there is another channel here, where it runs without resorting to the spiritual court, viz., chancery.[1]

A peremptory *mandamus* was granted. And note, Mr. Robert Eyre told me, that the Lord Chancellor Somers well approved this resolution.

HOVEY *v.* McLEAN.

1 Dem. Sur. 396. 1882.

THE SURROGATE. — The will of John McLean, late of Buffalo, deceased, was admitted to probate in this court on October 6th, 1881. At that time, the special guardian of the infant heirs-at-law and next of kin objected to the granting of letters testamentary to the executrix named in the will, Harriet E. McLean, the widow of the deceased, she having no separate estate, on the ground that her circumstances were such as not to afford adequate security for the due administration of the estate. It appears, from the examination of the executrix on the probate of the will, that her husband's estate consists of about $5,000, in money deposited in savings banks in her own name, and some real estate which is hers for life, but which she may sell and convert into money in her discretion. The money in the banks was her husband's, but, during his sickness and while in the full possession of his mental faculties, he directed the officers of the banks to transfer the deposits to his wife. They had been married for twenty-four years, and had one son who lived with them, and every fact in the case would tend to show that she had been a good wife, and was appreciated by her husband and thoroughly enjoyed

[1] The Court of Chancery, accordingly, restrained Watts from intermeddling until he should have given security. s. c. Carth. 457, 458.

his confidence. He, of course, was entirely familiar with her pecuniary circumstances, and, with faith in their sufficiency, he transferred his deposits, amounting to more than $5,000, to her credit, where they now stand. By his will, he gives to his wife a life estate in the whole of his real and personal property, and it is a grave question of construction of the will whether she has not absolute power of disposition, for her needs, of all the personal estate. It seems to me that the case of *Shields* v. *Shields*, 60 Barb. 56 is controlling on the question presented. The section of the Code (2638) is more favorable to the executrix now than the provisions of the Revised Statutes were when that case was decided, in that it leaves out the words "are so precarious," making it read "his circumstances are such"; and the dissent to the case cited, expressed in *Freeman* v. *Kellogg*, 4 Redf. 218 has less, if any, weight. We think, with the learned Judge (Potter) who wrote the opinion in *Shields* v. *Shields*, *supra*, that every case where such complaint is made must depend upon its own peculiar features and circumstances, of which the Surrogate is the appropriate judge. In the case at bar, I do not think the features and circumstances disclosed make a case where, in the exercise of a reasonable discretion, I can order the executrix to give bail. I do not think her circumstances are such that they do not afford adequate security for the due administration of the estate.

The objections of the special guardian are dismissed and letters testamentary will issue to the executrix named in the will.

Decreed accordingly.[1]

[1] *Hathornthwaite* v. *Russel*, 2 Atk. 126, *accord.*

As to whether security may be required from an executor by the probate court in the United states, see, 1 Woerner, Am. Law Adm. (2d ed.), §§ 250–252.

See *Estate of Plaisance*, Myr. Prob. 117 (immorality); *Clark* v. *Patterson*, 214 Ill. 533 (immorality); *Sill* v. *McKnight*, 7 W. & S. 244 (drunkenness); *Hills* v. *Mills*, 1 Salk. 36 (insanity); *Evans* v. *Tyler*, 2 Rob. Ecc. 128 (insanity).

In many states the qualifications for an executorship are governed by statute. Compare Massachusetts Rev. Laws (1902), c. 136, § 4; New York, Code Civil Proc. § 2564; and, generally, 1 Woerner, Am. Law of Adm. (2d ed.), §§ 230–233.

NOTE. — On executors according to the tenor, or implication, see *Grant* v. *Spann*, 34 Miss. 294; *Matter of Blancan*, 4 Redf. 151; *Richards* v. *Moore*, 5 Redf. 278; *Matter of McDonnell*, 2 Bradf. 32; *Matter of McCormick*, 2 Bradf. 169; *Baker* v. *Baker*, 45 N. Y. Supp. 870; *Watson* v. *Mayrant*, 1 Rich. Eq. 449; *Stone* v. *Brown*, 16 Tex. 425; *Goods of Baylis*, L. R. 1 P. & D. 21; *Goods of Punchard*, L. R. 2 P. & D. 369; *Estate of Stanley*, [1916] P. 192.

On executors according to substitution or nomination, see *Bishop* v. *Bishop*, 56 Conn. 208; *Kinney* v. *Keplinger*, 172 Ill. 449; *Wilson* v. *Curtis*, 151 Ind. 471; *Brown* v. *Just*, 118 Mich. 678; *Hartnett* v. *Waudell*, 60 N. Y. 346; *Goods of Lighton*, 1 Hagg. Eccl. 235; *Goods of Cringan*, 1 Hagg. Eccl. 548; *Goods of Langford*, L. R. 1 P. & D. 458.

An executorship may be subject to a condition. *Knox* v. *Newman*, 44 N. J. Eq. 309; *Alice Frances' Case*, Dyer 4a, *in marg.*; may be limited in time, *Pemberton* v. *Cony*, Cro. El. 164; may be limited as to place, *Thomas* v. *Bryson*, 5 Gill & J. 483; *Sherman* v. *Page*, 21 Hun. 59; *Goods of Wallich*, 3 Sw. & Tr. 423; *Goods of Astor*, 1 P. D. 150. As to whether one can be an executor for a particular chattel or class of chattels, see Anon., Dyer 36; *Austre* v. *Audley*, 1 Roll. Ab. 914; *Rose* v. *Bartlett*, Cro. Car. 292, 293; *Owen* v. *Owen*, 1 Atk. 494; *Goods of Wakeham*, L. R. 2 P. & D. 395.

BODLE, Acting Executor, etc. *v.* HULSE.

5 Wend. 313. 1830.

By the Court, Savage, Ch. J.[1] Where there are several executors, they must all join, even though some renounce. It was so resolved in *Hensloe's Case*, 9 Coke, 37, and the same practice is recognized by subsequent writers and in subsequent cases. 1 Chitty's Pl. 13. 1 Saund. 291, g. The reason assigned by Bacon, 3 Bac. 32, is, that all the executors have the right in them, and he that did not prove may come in when he pleases; and even he who renounced may administer after the death of the other executors, *Toller*, 68, 69.

The proper practice, where one renounces, probably is to prosecute in the name of all the executors named in the will, if living, and on summons to those who will not join, there will be judgment of severance; and then the others may proceed and recover in their own names. *Toller*, 44, 5, 3 Bac. 32. Cro. Jac. 420.

The defendant is entitled to judgment of *respondeas ouster*, upon the demurrer to his plea in abatement.[2]

[1] The statement of facts is omitted.

[2] This is no longer law in New York. Code Civil Proc., § 1818; compare *ibid.*, § 2628.

Illustrations that failure or refusal to qualify as executor are not conclusive are *Robertson* v. *McGeoch*, 11 Paige, 640; *Davis* v. *Inseoe*, 84 N. C. 396; *Matter of Taggart*, 1 Ashmead 321; *Gallagher* v. *Gallagher*, 6 Watts, 473; *Perry* v. *DeWolf*, 2 R. I. 103; Anon., 21 Edw. 4, 23, pl. 8; Bro. Abr. Executor, pl. 27.

"And the court took this difference, when many are named executors and some of them refuse, and some of them prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding this refusal before the Ordinary; but if all refuse before the Ordinary, and the Ordinary commits administration to another, then they cannot afterwards administer," *Hensloe's Case*, 9 Co. 36 b, 37 a. See *Brookes* v. *Stroud*, 1 Salk. 3; *Webster* v. *Spencer*, 3 B. & Ald. 360; *Waters* v. *Pfeil*, M. & M. 362; *Scott* v. *Briant*, 6 N. & M. 381; *Goods of Smith*, 3 Curt. Eccl. 31.

But if one of two executors renounces, it is not necessary to cite him in on the death of the other executor before appointing an administrator *cum testamento annexo*. The renunciation continues, unless withdrawn. *Harrison* v. *Harrison*, 1 Rob. Eccl. 406; *Venables* v. *East India Co.* 2 Exch. 633.

Illustrations that failure or refusal to qualify are conclusive. *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Cleveland* v. *Chandler*, 3 Stew. (Ala.) 489; *Mitchell* v. *Rice*, 6 J. J. Marsh 623; *Jewett* v. *Turner*, 172 Mass. 496; *Rhinehart* v. *Rhinehart*, 15 N. J. Eq. 44; *Burrow* v. *Sellers*, 1 Hay. 501; *Alston* v. *Alston*, 3 Ired. 447; *Thorton* v. *Winston*, 4 Leigh 152; *Briggs* v. *Probate Court of Westerly*, 23 R. I. 125; Anon., Dyer, 160 b; *Davies* v. *Williams*, 1 Sim. 5. Compare *Smith* v. *Steen*, 20 N. M. 436; *Varble* v. *Collins*, 168 Ky. 247; *Goods of Thornton*, 3 Add. Eccl. 273.

The English law in the case of renunciation is now settled by Stat. 20 & 21 Vict., c. 77, § 79 (1857), "where any person . . . renounces the probate of a will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

LONG AND FEAVER *v.* SYMES AND HANNAM.

3 Hagg. Eccl. 771. 1832.

THIS was a proceeding by two legatees under the will of John Feaver to compel the executors to take probate, alleging that they had intermeddled: and the question was, whether they had so intermeddled as no longer to be entitled to refuse. The facts of the case as stated by the legatees were these.

John Feaver died on the 17th June 1829, leaving a will dated on the 11th of June 1829, of which the defendants were the executors. On the 29th of July and on the 3rd of August the following advertisement was inserted in the Sherborne Paper. — "All persons who have any claim on the estate of the late John Feaver of Horsington, in the county of Somerset, deceased, are requested to send their respective accounts and are desired to pay all money due to the said estate without delay to Mr. Symes of Combe Farren in the county of Dorset, or to Mr. Hannam of Darkhourbour, in the county of Somerset, his executors in trust." It was alleged further, that Symes and Hannam applied to several persons for payment of their debts, particularly that Symes applied to one Hilliar, and on the 20th August received of Allan 20 *l*, for which sum Symes and Hannam opened an account, as executors, with a banking house, and which sum was afterwards withdrawn by Symes. That Symes and Hannam received and paid other monies; and on the 17th June 1831, signed an authority to Melmoth, a solicitor who had possession of the will, to deliver it up to another solicitor, Newman.

In reply it was alleged that soon after the deceased's death Symes informed the widow and Feaver that he would not act; that on the 4th of July 1831, he and Hannam renounced by proxy, and steps were taken to obtain administration for the widow and George Feaver the residuary legatees; that the advertisements were inserted because the widow was receiving the debts; that Symes applied for no debt but Allan's, though he delivered small accounts to two or three persons; that on the 20th of August he received 21*l* of Allan for the widow, and deposited that sum at the bankers to the credit of the deceased; that on the 17th of June, he signed the order for the delivery of the will, but afterwards countermanded it. Hannam did not deny that the advertisements were inserted with his privity, nor that he signed the order on the 17th of June, but he denied that he applied for or received any debts.

JUDGMENT.

SIR JOHN NICHOLL.

[After stating the substance of the act on petition on either side.] The question then is, whether there has been such an intermeddling as to render the executors compellable to take probate? There is

no doubt on the law that if a person named executor intermeddles, he cannot afterwards refuse to take probate; and if not named executor, he becomes so *de son tort*. There are certain acts of necessity, such as feeding the deceased's cattle and the like which do not bind a party; and if a party even has shown himself willing to take upon himself the execution of a will, he may, in aid of justice, be dismissed by the Court, in order to become a witness (*Panchard* v. *Weger*, 1 Phill. 212. *Jackson* v. *Whitehead*, 3 Phill. 577. See also *Meek* v. *Curtis*, Vol. I. 129. *M'Donnell* v. *Prendergast*, *supra*, 212, and Williams' Laws of Executors and Administrators, Vol. I. p. 148, as to cases where an executor may refuse the office); but otherwise slight circumstances are obligatory and sufficient to compel a person to take probate if really executor, or to render him executor *de son tort*, if not really executor. Swinburne in several passages lays down the obligation, and says (Part 6. s. 22), "he must beware not to administer the effects as executor." He is compellable "when he does those acts which are proper to an executor." "The most safe course is not to meddle at all, but utterly to abstain": "the refusal cannot be by word only, it must be entered and recorded in Court."

This doctrine is laid down no less strongly in several books of common law. In Bacon's Abridgment (Executors (E.) 10. Also Roll's Abr. 917) it is said, "What acts amount to an administration, so that a party cannot afterwards refuse." "1st, Whatever an executor does which shows an intention in him to take upon him the executorship, will regularly amount to an administration." "2d, Whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship." In *Edwards* v. *Harben* (2 T. R. 597), Mr. Justice Buller says: "He can be charged as executor, because any intermeddling in the testator's effects makes him so: every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*." If such acts will make a man executor *de son tort*, *à fortiori* it will render an executor compellable to take probate.

What then are the facts? Have the executors done anything that showed an intention on their part to take upon them the executorship? It is unnecessary to go one step further than the advertisements: nothing can be a more strong intermeddling than the insertion of such an advertisement, and expressly in the character of executors. It does not merely "show an intention to take upon them the executorship," but it is an absolute acceptance of the executorship. Nor was this done by Symes alone, for Hannam admits that it was done with his concurrence; that it was their joint act: and after this concurrence the acts of Symes in a great degree bind Hannam.

They subsequently make inquiries, and they find that the executorship may turn out a troublesome business, and then they give notice to the family that they will not act; the matter lies dormant till the

following year, when in answer to an application by letter they decline to undertake the office. That was too late in time and insufficient in form —"the refusal must be recorded in Court": till that was done no person could take administration. They should have decided at once; they might have delivered up or brought in the will and given a proxy of renunciation. As the authorities point out, they should "beware" how they do slight acts. I think they have not been cautious; they should not have first acted and given notice to the debtors to the estate, and afterwards leave the substituted residuary legatees without that protection for their legacies which the testator intended. For two years and a half they have left this estate, though small, without a representative or any person even to collect the debts.

I am of opinion that the executors have so far intermeddled as to be compellable to take probate, and that their resistance subjects them personally to costs, which certainly ought not to be paid out of the estate without the consent of the residuary legatee and substituted residuary legatee; nor till after the legacies which have been put in jeopardy by the conduct of these parties have been discharged.

The Court condemned the executors personally in costs, and assigned them to extract probate before the by-day.[1]

GOODS OF PERRY.

2 Curt. Eccl. 655. 1840.

This was an application on behalf of the executor of an executor, to be allowed to renounce the probate of the will of the first testator, before taking probate of the will of the second testator. According to the ordinary practice of the office, the executor of an executor becomes, on taking probate of his will, the executor of the first testator.

Sir Herbert Jenner. It has been for many years the practice in this court, that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will, and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed.

Motion rejected.[2]

[1] Compare *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Wickendon* v. *Thomas*, 2 Brownl. 58; *Parten* v. *Basden*, 1 Mod. 213; *Doyle* v. *Blake*, 2 Sch. & L. 231, 237.

[2] In the United States the executor of an executor is by statute not entitled to administer the estate of the first testator. 2 Woerner, Am. Law of Adm. (2d ed.), § 350.

READ'S CASE.

5 Co. 67. 1604.

READ brought an action of debt against Carter executor of Yong, which plea began in the Common Pleas, Hil. 44 Eliz. Rot. 401. The jurors found, that the said Yong made his testament and last will, and made one A. his executor; and the day of his death was possessed of goods above the value of the debt in demand, and died; and before the will was proved the defendant took the testator's goods into his possession, and intermeddled with them; and afterwards, and before the writ purchased, the will was proved; and if on this matter the defendant should be charged as executor of his own wrong was the question. And on great deliberation judgment was given for the plaintiff. And in this case these points were resolved.

1. When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as executor; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor: yet it was resolved, and well agreed, that when no one takes upon him to be executor nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand: but although there be an executor who administers yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, there, for such administration as executor, he may be charged as executor of his own wrong, although there be another executor of right; and therewith agreeth 9 E. 4, 13.[1]

3. In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come

[1] Compare *Hall* v. *Elliot*, Peake 86, 87.

to his hands after he takes upon him the charge of the will. Note, reader, these resolutions, and the reason of them, and by them you will better understand your books, which otherwise seem *prima facie* to disagree.[1] 41 E. 3, 13 b; 50 Ed. 3, 9; 6 H. 4, 3 a; 11 H. 4, 83 b, 84 a; 13 H. 4, 4 b; 8 H. 6, 35 b; 19 H. 6, 14 b; 21 H. 6, 26 & 27; 32 H. 6, 7 a; 33 H. 6, 21; 21 E. 4, 5 a; 20 H. 7, 5 a; 26 H. 8, 7 b, 8 a; 1 Eliz. Dyer, 166; 9 Eliz. Dyer, 255. And so the *quære* in 1 *Mariæ* Dyer, 105, 203, well resolved.

PERKINS *v.* LADD.

114 Mass. 420. 1874.

TORT, brought by the administrator of the estate of Frank A. Rolfe, for the conversion of two horses belonging to the estate.

At the trial in the Superior Court, before LORD, J., there was evidence to show that the plaintiff's intestate, an officer in the United States army, was killed in the battle of the Wilderness in 1864; that his horses, sword and various other articles were sent by the general of the army to Washington, D.C., directed to the care of the defendant, a paymaster in the United States army, who forthwith forwarded all the articles, except the horses, to the widow of the deceased at Lawrence, Mass., where she then resided; that the horses were sick and diseased and in bad condition; that they were put in a stable under the charge of a stablekeeper, and that the defendant sought of the widow directions as to what disposition should be made of them; that she thereupon directed him to have them sold at Washington, and to send her the proceeds; that the defendant, in accordance with her directions, employed an auctioneer to sell them for her at public auction, and sent her the proceeds, which she received; that the stablekeeper's charge for keeping was $1.00 per day for each horse; that the defendant never acted or claimed to act concerning the horses except in accordance with the directions of the widow; that he never had any personal benefit from the horses or the proceeds, and that he charged nothing for his services; and that these transactions all took place within a few weeks of Rolfe's death.

The plaintiff contended that the defendant acted for himself, and that he neither was, nor could be, justified in what he did touching the disposal of the horses by any power which the intestate's widow

[1] *Kellow* v. *Westcombe*, Freeman 122; *McMorine* v. *Storey*, 3 Dev. & B. 87 (*semble*), *accord*.

If before action brought the executor *de son tort* can show a delivery of assets to the rightful representative, it is a good defence. HOLT, C. J., in Anonymous, 1 Salk. 313; *Padget* v. *Priest*, 2 T. R. 97, 100; *Hill* v. *Curtis*, L. R. 1 Eq. 90.

As to the liability of one who intermeddles with the estate after the death of the true executor or administrator, see *Cottle* v. *Aldrich*, 4 M. & S. 175; *Tomlin* v. *Beck*, T. & R. 438; *Williams* v. *Heales*, L. R. 9 C. P. 177.

did or could confer upon him. He also contended that the sale was a pretended one, made pursuant to a secret arrangement between the defendant and the auctioneer, by which the possession of the horses, or of one of them, passed to the defendant, in fraud of the plaintiff's intestate's estate.

The court instructed the jury that under the laws of Massachusetts the widow was *prima facie* entitled to administer upon the estate of her deceased husband; that if Mrs. Rolfe, immediately upon knowing that the effects of her deceased husband were in the care of the defendant at Washington, requested him to act in reference to them in her behalf, and he did so act in good faith, (said property being perishable in its nature), and made the sale as her agent and at her request, and in all respects accounted with her for all which he received, that he was not liable; but that if he undertook in any manner to act in his own behalf, or to secure for himself directly or indirectly any benefit from the sale of the horses, or if there was any secret arrangement or understanding between himself and the auctioneer that he was to become possessed of one or of both the horses under a pretended sale, then the action might be maintained, and he would be liable for the value of the horses to the present plaintiff.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

DEVENS, J. The rights of the plaintiff, who seeks to recover here for an alleged conversion of the property of his intestate, must be governed by the principles which would control in an action for wrongful intermeddling with the estate by one who it was claimed had thereby rendered himself liable as executor *de son tort*. Under Gen. Sts. *c.* 94, § 14, any one intermeddling injuriously with the estate of a deceased person without being thereto authorized by law, is liable to the persons aggrieved as an executor in his own wrong; and by section 15 of the same chapter, every executor in his own wrong is liable to the rightful executor or administrator for the full value of the goods taken by him, and for all damage caused by his acts to the estate of the deceased.

Upon the evidence in the case, the defendant was rightfully in possession of the horses, the value of which is sued for, the intestate having been an officer of the United States army, killed at the battle of the Wilderness in 1864, and his effects having been, by the direction of the commanding general, placed in charge of the defendant, who was then a paymaster in the army. Under the instructions, the jury must have found that, upon being informed that the effects of the intestate were in the care of the defendant at Washington, his widow requested him to act for her in reference to them; that he did so in good faith; that, the property being perishable in its nature (consisting of horses diseased and in bad condition, which could only be kept at great and disproportionate expense), he, in compliance with her directions, sold them and remitted to her the proceeds;

and that he in no manner acted in his own behalf, nor in any way, directly or indirectly, secured to himself any benefit from the transaction.

The acts of the defendant, upon which it is sought to charge him, were done in 1864, and it would be unfortunate in the present case if the general principles of law were such as to compel us to charge the defendant (who appears to have acted throughout with the honorable purpose of saving the effects of a fellow soldier, and neither to have asked nor received compensation for his services) with liability in a suit brought so long after the transactions referred to. We are of opinion that they do not so compel us, and that the ruling under which a verdict was rendered for the defendant is not open to exception.

Upon the death of a person, a short time must necessarily elapse before title to his personal property can be acquired by the issue of letters testamentary or of administration. Within this period, however, many acts must be done if such property is to be suitably preserved. Goods must be stored, animals fed and cared for, and perishable property must be disposed of. As by Gen. Sts. *c.* 94, § 1, the widow, or next of kin, or both, as the Probate Court shall see fit, are entitled to the administration, no person can be more suitable than the widow to take such temporary charge of the property We are to consider whether one who aids her in this, acting simply as her servant and agent, becomes liable for the value of the goods which he thus assists her in caring for, and, when the property is perishable, in disposing of.

It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. This was carried to such an extent, that a wife has been held liable as executrix *de son tort* for milking the cow of her deceased husband. *Gerret* v. *Carpenter*, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, &c., for these are necessary acts of kindness and of charity. 1 Williams on Executors, (4th Am. ed.) 214, and cases there cited. *Camden* v. *Fletcher*, 4 M. & W. 378

In *Padget* v. *Priest*, 2 T. R. 97, Mr. Justice Buller intimates that if the defendant had acted merely as the servant of another, he should not be held liable. In *Brown* v. *Sullivan*, 22 Ind. 359, it was held that taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, did not make one liable as executor *de son tort*. In *Givens* v. *Higgins*, 4 McCord, 286, it was held that one acting as agent for the widow, and not knowing in what character she was acting, would be considered as her agent merely, and not as exercising such control over the funds of the estate as to make himself liable. In this case the defendant had, by direction of the widow, transferred certain property of the deceased in

payment of one of his debts. In *Magner* v. *Ryan*, 19 Missouri, 196, it was held that a person who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate, which he had done merely as the servant of another.

Both these last cases go much further than the present case, and perhaps further than we should be willing to go. The rules against intermeddling with the estates of deceased persons are important, as the interval of time between the decease and the appointment of an administrator affords opportunities of which evil disposed or even intrusive and officious persons should not be allowed to take advantage, by interfering with the administration of the person who may thereafter be appointed. When, however, one can show (and this is all that it is requisite in order to sustain the ruling of the presiding judge) that he has acted in good faith, at the request of the party entitled to administration, in doing an act in disposing of perishable property apparently necessary for the purpose of having its proceeds reach those entitled to them, and has paid over the proceeds to the party at whose request he has thus acted, he is not responsible for a wrongful conversion of the property.

Exceptions overruled.[1]

CHAMBERLAYNE AND OTHERS *v.* TEMPLE.

2 Rand. 384. 1824.

JUDGE GREEN [2] delivered the opinion of the Court.

The appellee, claiming to be a creditor of Byrd Chamberlayne, prosecuted in the life-time of the latter, an action at law against him, which abated by the death of the defendant. The former thereafter prosecuted an action for the same cause, against Edward P. Chamberlayne, the administrator of Byrd Chamberlayne; and, having obtained a verdict, a judgment was rendered by consent of the parties, to be levied of the goods and chattels of the intestate, then in the hands, or which might thereafter come to the hands, of the defendant, to be administered, after satisfying thereout all debts of superior dignity and prior judgments. Upon this judgment, no further proceedings were had; nor was any execution taken out thereupon. The plaintiff then filed his bill against the administrator *de bonis non* of Byrd Chamberlayne, and the appellants, the children

[1] Acts which do or do not constitute an intermeddler an executor *de son tort*, *Bacon* v. *Parker*, 12 Conn. 212; *Taylor* v. *Moore*, 47 Conn. 278; *Rohn* v. *Rohn*, 204 Ill. 184; *Hubble* v. *Fogartie*, 3 Rich. 413; *Hopkins* v. *Towns*, 4 B. Mon. 124; *Emery* v. *Berry*, 28 N. H. 473; *Sharland* v. *Mildon*, 5 Hare 469; *In re Lovett*, 3 Ch. D. 198. Compare *Smith* v. *Porter*, 35 Me. 287; *Fleminge* v. *Jarrat*, 1 Esp. 335; *Hill* v. *Curtis*, L. R. 1 Eq. 90, 97.

[2] The statement of facts is omitted and only a part of the opinion is given.

of Byrd Chamberlayne, to whom the latter had, in his life-time, conveyed sundry slaves, by several deeds; alledging, that those conveyances were voluntary and fraudulent as to the creditors of the donor, and praying that the slaves should be subjected to the payment of his demand. The defendants, claiming under those deeds, insisted upon their validity; that the plaintiff had no just demand upon Byrd Chamberlayne; and that the judgment at law was obtained by the collusion and fraud of the plaintiff and the administrator. The plaintiff offered no evidence in support of his demand, other than the record and judgment in the suit at law. That record, independent of the verdict and judgment, affords no proof *per se* of the justice of the plaintiff's demand. The Court of Chancery declared the deeds to be fraudulent and void, and that the property should be surrendered by the defendants, and sold for the satisfaction of the judgment; from which decree, the defendants claiming under the deeds appealed. . . .

It was not necessary, as a pre-requisite to the maintaining of this suit, to have previously established the fact of a deficiency of assets, in another suit; or to have bound the property by an action against the donees, as executors *de son tort*, proving in that cause that there were no other assets to satisfy the demand, and prosecuting the same to judgment and execution, as might have been done. 13 Vin. Abr. tit. Fraud, C. Pl. 5. For, all creditors have a specific right to be satisfied out of the property of their deceased debtor, in the hands of his executor or administrator, if there be a rightful executor or administrator; or, if not, in the hands of his executor *de son tort;* or if, as in this case, there be a rightful executor or administrator, and also an executor or executors *de son tort*, out of the debtor's property in the hands of the latter, if there be not sufficient assets in the hands of the former. This is in the nature of a *lien;* and the executor or administrator, and executor *de son tort*, are in the nature of trustees for the creditors. In general, when there is a rightful executor or administrator, there cannot be an executor *de son tort;* because, any person, having possession of the property of the deceased, is responsible therefor to the rightful executor or administrator, and ought not, therefore, to be responsible to creditors also. Otherwise, he would be doubly chargeable. But, in the case of fraudulent conveyances, the donee in possession is an executor *de son tort*, although there be a rightful executor or administrator. For, as he cannot be made responsible therefor to the rightful executor or administrator, the reason of the general rule fails in that case; and if the donee was not, in such case, liable as executor *de son tort*, the creditor would be without remedy. *Roberts on Fraud*, Con. 593, and cases there cited; *Pierce* v. *Turner*, 5 Cranch; *Edwards* v. *Harben*, 2 Term Rep.; 11 Vin. Abr. 219, Pl. 9, and notes; 13 do. tit. Fraud, C. Pl. 5.[1]

[1] *Dorsey* v. *Smithson*, 6 Har. & J. 61 (*semble*); *Foster* v. *Nowlin*, 4 Mo. 18, 24; *Sturdivant* v. *Davis*, 9 Ired. 365, *accord*. Compare *Howland* v. *Dews*, Charlt. R. M. 383; *Gleaton* v. *Lewis*, 24 Ga. 209; and see *post*, p. 460 note.

The plaintiff, therefore, had a right, without first binding the property otherwise, and without otherwise shewing that he was defrauded, in consequence of there being no other fund, to satisfy his demand, than the property in the hands of the donees, by another suit, to go originally into a Court of Equity against the donees as executors *de son tort*, for a discovery, account and satisfaction, out of the assets in their hands; and, in that suit, to establish his demand, if it had been liquidated, or was a matter of account, and not before established; and to shew that he could not get satisfaction otherwise, and so was *hindered*, *delayed*, and *defrauded*. And this he has virtually done, although he does not call them in terms executors in their own wrong. In this case, a preliminary suit at law against the rightful administrator, or against the donees, was necessary, as the claim sounded in damages; and the rightful administrator was properly made a party, to account for the assets which had come to his hands. For, if he had had assets to pay the demand, the conveyances would not have been void.

[The learned judge then said that the deeds of the slaves to the defendants were fraudulent and void as to creditors of the donor, and continued as follows:]

It is also insisted, that the donees ought to have been subjected to a rateable contribution, for the satisfaction of the demand of the appellee. At law, persons claiming under voluntary, fraudulent, and void conveyances, cannot require a creditor to proceed against them severally, for rateable proportions of the debt. He might proceed against them severally, after the death of the debtor, as executors *de son tort*, for the full value of the assets of the debtor in their hands; and the insolvency of one would not excuse any other; and so it should be in equity, if an attempt to equalize the burthen, produced any unreasonable delay or detriment to the creditor. But where, as in this case, the creditor has convened all the parties, none of whom are chargeable with actual fraud, and where all the materials for a just apportionment are already in the record, and that can be made without any material delay or injury to the creditor; a court, whose maxim is that equality is equity, should apportion the demand amongst the parties responsible thereto; the more especially as, if the burthen was unequally borne, and the suffering party could, in that event, claim contribution of the others, this would involve those parties in new litigations. But, this ought to be done with a reservation of the right to the creditor, to resort for satisfaction to all the parties responsible to him, to the full extent of their liabilities respectively, in the event of his failing, from insolvency or any other cause, to procure satisfaction from any of the parties, of their due proportions of his demand.

The decree should be corrected in this particular, and the appellants should pay to the appellee his costs, he being the party substantially prevailing.

SLATE *v.* HENKLE.

45 Oreg. 430. 1904.

STATEMENT by MR. CHIEF JUSTICE MOORE.

This is a suit to recover expenses incurred and fees claimed to have been earned in the alleged administration of a decedent's estate. Frances Slate, an inhabitant of Benton County, died intestate therein November 22, 1895, and, having left real and personal property in Linn County, the county court thereof, on May 16, 1900, appointed her son, Porter Slate, the plaintiff herein, administrator of her estate, who gave the required undertaking and received letters of administration. Thereafter the county court of Benton County appointed J. E. Henkle, the defendant herein, administrator of such estate, who, having duly qualified, instituted a suit against Slate, and secured a decree discharging him: *Slate's Estate*, 40 Or. 349 (68 Pac. 399). Henkle thereupon began an action against Slate to recover $600 for the use of such real property and the sum of $230.70 for certain personal property belonging to the decedent's estate, which it was alleged he had converted to his own use. Slate, having answered in such action, also filed the complaint herein in the nature of a cross-bill in equity, alleging, in effect, that, relying upon his appointment as administrator, and acting in good faith, he sold certain personal property belonging to the decedent's estate, realizing therefrom the sum of $191.98, and that he had paid on account of expenses incurred in administration the following sums:

Taxes on the decedent's property	$ 8.00
To a surety company for responsibility assumed on his undertaking	50.00
To appraisers	6.00
To justice's fees administering oaths to appraisers	2.00
To baling hay	14.50
To hauling hay to market	5.85
To storing hay in a warehouse	5.82
To attorney's fees	100.00
Total	$192.17

Slate further alleges that he was entitled to $100 for service performed in caring for the decedent's property from May 16, 1900, to March 3, 1902; and that he had no plain, adequate, or speedy remedy at law. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was overruled, and, the defendant herein (Henkle) declining further to plead or answer, a decree was rendered requiring him to pay the sums so incurred and demanded, and he appeals.

Reversed.

MR. CHIEF JUSTICE MOORE delivered the opinion.[1]

[1] Part of the opinion is omitted.

1. It is contended by defendant's counsel that Slate had an adequate remedy in the law action to recoup all expenses that he had legitimately incurred in relation to the decedent's estate by alleging such facts in an answer to the complaint therein, and hence an error was committed in overruling the demurrer to the cross-bill and in rendering the decree herein. Any person who, without authority, intermeddled with the estate of a decedent, by doing such acts as properly belonged to the office of an executor or administrator, was originally denominated an executor *de son tort*, who could be sued by the legal representative of the deceased, by a creditor of the estate, by a legatee, and, if all the debts were paid, by a distributee, and was liable to the extent of the assets which he had received: 11 Am. & Eng. Enc. Law (2 ed.), 1342, 1351. Our statute has abolished the common-law rule which made one who officiously interfered with the property of a deceased person an executor *de son tort* by depriving creditors of the estate and others of the remedy which they anciently possessed of charging the intermeddler as an executor of his own wrong; but the latter is now made responsible only to the legal representative of the decedent for the value of all property taken or removed and for all injury caused by his interference therewith: B. & C. Comp. § 385; *Rutherford* v. *Thompson*, 14 Or. 236 (12 Pac. 382).[1] In the case at bar, the intestate, at the time of her death, not being an inhabitant of Linn County, the county court thereof had no jurisdiction of the subject-matter of her estate, and its letters of administration issued to Slate were therefore void: *Slate's Estate*, 40 Or. 349 (68 Pac. 399). The appointment being a nullity, Slate's possession and sale of the personal property belonging to the estate, if it were not for the immunity afforded by our statute, amending the common-law rule, would have rendered him an executor of his own wrong: 1 Abbott, Probate Law, § 407; *Bradley* v. *Commonwealth*, 31 Pa. 522. He undoubtedly had reason to believe and did believe that his appointment was valid, and this being so, every advantage that an executor *de son tort* can invoke should be applied in his favor.

2. The rule is universal that such an executor is subject to all the liabilities of an ordinary executor without being entitled to any of his privileges: 11 Am. & Eng. Enc. Law (2 ed.), 1351; 1 Woerner, Administration (2 ed.), § 193; 1 Williams, Executors, *216. The statute 43 Eliz. c. 8, so far as material herein, enacted "That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge, or any debt or duty that belonged to the intes-

[1] In the following states the liability of an intermeddler as executor *de son tort* does not now exist. *Winfrey* v. *Clarke*, 107 Ala. 355; *Barasien* v. *Odum*, 17 Ark. 122; *Bowden* v. *Pierce*, 73 Cal. 459; *Fox* v. *Van Norman*, 11 Kan. 214; *Noon* v. *Finnegan*, 29 Minn. 418; *Rozelle* v. *Harmon*, 103 Mo. 339; *Babcock* v. *Booth*, 2 Hill (N. Y.) 181; *Dixon* v. *Cassell*, 5 Ohio 533; *Ansley* v. *Baker*, 14 Tex. 607; *Blinn* v. *McDonald*, 92 Tex. 604, 608; *Roys* v. *Roys*, 13 Vt. 543.

tate, . . . shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance . . . of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm": 4 Bacon, Ab. (Bouv. Notes), 28. The enactment of this statute probably gave rise to the rule adopted by courts that just debts of a decedent which have been paid by an executor *de son tort* according to their legal priority may be set off against the amount of damages for which his intermeddling has rendered him liable: 11 Am. & Eng. Enc. Law (2 ed.), 1353; *Cook* v. *Sanders*, 15 Rich. Law (S. C.), 63 (94 Am. Dec. 139); *Bennett* v. *Ives*, 30 Conn. 329. Mr. Schouler, in his work on Executors and Administrators (section 188), in discussing the right of a person concerned in, but not the legal representative of, a decedent's estate, to be credited with expenses incurred in the due administration thereof, says: "The acts, moreover, of one having the color of a title or a claim to administration, and, like a widow, next of kin, legatee, or creditor, directly interested in preserving the estate, are, if so performed that the rightful allowance, share, legacy, or debt of the custodian may stand as indemnity for the transaction, treated with increasing indulgence, in contrast with those performed by some stranger who officiously intrudes." The editors of the American and English Encyclopedia of Law (1 ed. vol. 28, p. 499), in defining the word "volunteer," say: "A person who gives his services without any express or implied promise of remuneration in return is called a volunteer, and is entitled to no remuneration for his services. . . . But a person who, though not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer." In the case at bar it will be remembered that Slate is a son of the deceased, and was chosen administrator of her estate before Henkle was constituted the legal representative thereof. Slate's mother having died intestate, seised of real property in this State, he thereby became invested with the title to a share thereof (B. & C. Comp. § 5577), and also to a part of her personal property, after the payment of her debts and the distribution of allowances (B. & C. Comp. § 5578), and is directly interested in the settlement of her estate, and entitled to be credited with all reasonable sums paid out by him in the settlement thereof that resulted in a benefit thereto: *Rutherford* v. *Thompson*, 14 Or. 236 (12 Pac. 382).

3. This being so, it remains to be seen whether or not he had a plain, adequate, and complete remedy at law for the recovery of the sums so paid and for the services performed, for, unless such redress existed, he is not precluded from resorting to a suit in equity for the settlement of his reasonable demands: B. & C. Comp. § 390. Mr. Woerner, in his valuable work on the American Law of Administration (2 ed. § 195), in speaking of the right of an executor *de son*

tort to recoup in an action instituted against him by the administrator to recover compensation for the injury sustained by reason of his intermeddling with the goods of a deceased person, says: "He may prove, however, under the general issue, in mitigation of damages, payments made by him in the rightful course of administration, because it is no detriment to the administrator *de jure* that such payments were made by the executor *de son tort*." Williams, in his work on Executors (American Notes by Randolph & Talcott, vol. 1, p. 316), in discussing this subject, says: "With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show that, if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration, upon this ground: that the payments which are thus, as it is termed, recouped in damages, were such as the lawful executor or administrator would have been bound to make; and therefore it cannot be considered as any detriment to him that they were made by an executor *de son tort*." To the same effect, see 11 Am. & Eng. Enc. Law (2 ed.), 1352.

Mr. Chief Justice Lord in *Rutherford* v. *Thompson*, 14 Or. 236 (12 Pac. 382), in discussing the effect of our statute amending the common-law rule, and of the right of an executor *de son tort* to be credited with payments which he may have made that are tantamount to a due administration of a decedent's estate, says: "The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator. And whether we consider the intermeddler as an executor *de son tort* or as a wrongdoer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice, as applied by the law in such cases. Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was of benefit, and not injury, to the estate — as the payment of funeral expenses, or debts of the deceased, or charges such as the rightful representative might have been compelled to pay — he would not be allowed to show the same in mitigation of damages in an action of trover, instituted by such executor or administrator. In thus compelling him to account with only the rightful representative the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor *de son tort* may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate." We think Slate had an adequate remedy in the law action instituted

by Henkle against him to recoup against the claim for damages caused by his intermeddling all payments made by him that necessarily conduced to the benefit of his mother's estate.

4. There are some items, however, in his claim, as disclosed by the cross-bill, that could never have been of any advantage thereto. Thus the sum paid to the surety company for responsibility assumed on Slate's undertaking, and also the appraisers' and justice's fees. The sum paid on account of attorney's fees was no advantage, unless the service rendered was in preserving the property of the estate; certainly not in the ordinary settlement thereof, or in defending in the former suit. The sum of $100 claimed by Slate should not be allowed, unless his service, like that of his attorneys, was performed in preserving or caring for the property, resulting in a benefit thereto.

5. He is not entitled to any sum whatever as administrator's fees, and if the county court appointing him had allowed and he had secured the sum prescribed by law as compensation in such cases, as he was only a *de facto* representative of the decedent's estate the *de jure* administrator could have recovered such fees from him, for the rule is almost universal that an officer *de facto* is liable to an officer *de jure* for emoluments of office after ouster: Throop, Pub. Officers, §§ 256, 523, 663. . . .

In the case at bar Slate was interested in the estate of his mother, and therefore not a volunteer, and, as he could have interposed the defense indicated in the law action, an error was committed in overruling the demurrer.

The decree will therefore be reversed, the demurrer sustained, and the cross-bill dismissed.[1]

Reversed.

[1] As to whether an executor *de son tort* may plead in defence or in mitigation of damages the application of assets in payment of lawful demands on the estate, see *Roggenkamp* v. *Roggenkamp*, 68 F. R. 605; *Brown* v. *Walter*, 58 Ala. 310; *Leach* v. *Prebster*, 35 Ind. 415; *Tobey* v. *Miller*, 54 Me. 480; *Glenn* v. *Smith*, 2 Gill & J. 493; *Gay* v. *Lemle*, 32 Miss. 309; *Howell* v. *Smith*, 2 McCord 516; *Kinard* v. *Young*, 2 Rich. Eq. 247; *Oxenham* v. *Clapp*, 2 B. & Ad. 309.

As to whether a creditor of the estate who is paid from the assets of the estate by one having no authority is liable to the administrator for the amount paid, see *Mitchell* v. *Kirk*, 3 Sneed. 319; *Mountford* v. *Gibson*, 4 East 441; *Thomas* v. *Harding*, 2 E. & B. 630. Compare *Carpenter* v. *Going*, 20 Ala. 587; *Woodfork* v. *Sullivan*, 23 Ala. 548; *Wilson* v. *Hudson*, 4 Har. (Del.) 168; *Morton* v. *Preston* 18 Mich. 60.

Executors *de son tort* cannot retain for their own debts. 1 Woerner, Am. Law of Adm. (2d ed.), § 193.

The executor *de son tort* of an executor is executor *de son tort* of the first decedent. *Dawson* v. *Callaway*, 18 Ga. 573; *Meyrick* v. *Anderson*, 14 Q. B. 719.

On the effect of the appointment of an executor *de son tort* as administrator *pendente lite*, see *Andrew* v. *Gallison*, 15 Mass. 325 n.; *Whitehead* v. *Sampson*, Freem. K. B. 265; *Vaughan* v. *Browne*, 2 Str. 1106.

SECTION IV.

GRANT OF ADMINISTRATION

STAT. 13 EDW. I., C. 19 (WESTM. II., 1285). — Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; (2) the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

STAT. 31 EDW. III., C. 11 (1357). — Item, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come.

STAT. 21 HEN. VIII., C. 5, §§ 3, 4 (1529). — § 3 . . . (6). And in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary, or other person or persons having authority to take probate of testaments, as is abovesaid, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorized to minister; (7) And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request, where divers do require the administration.

§ 4. Or where but one or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure. . . .

STAT. 29 CAR. II., c. 3, § 25 (1677). — And for the explaining one act of this present parliament, intituled, *An Act for the better settling of intestates' estates* [22 & 23 Car. II. c. 10 (1670)]. (2) Be it declared by the authority aforesaid, that neither the said act, nor anything therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

NOTE ON ADMINISTRATION.

In ancient times the distribution of the chattels of the deceased was made in the temporal courts. Cnut, Sec. Laws, c. 71; Charter, Hen. I, c. 1, § 7. The ecclesiastical court assumed jurisdiction in the thirteenth century. Magna Carta, c. 27 (1215); Bracton, f. 407; Bracton's Note Book, No. 381. The transition period of the twelfth century is represented by Pipe Roll, 18 Hen. II, pp. 98, 133; Glanvil, Bk. 7, cc. 8, 16. The Statute of 13 Edw. I, c. 19, *ante*, imposed on the ordinary the obligation of paying the debts of the intestate, although in *Snelling's Case*, 5 Co. 82 b, and in *Hensloe's Case*, 9 Co. 36 b, 39 b, it was said that this was a requirement of the common law.

In the early law when a man died his wife and children had shares in his chattels of which he could not deprive them by will. If he left a wife but no children, the widow took one half. If he left a wife and children, the widow took one third and the children one third. Glanvil, Bk. 7. c. 5; Magna Carta, c. 26 (1215); Bracton, ff. 60 b, 61; Fitzherbert, Nat. Brev., 122; Blackstone, Comm., Bk. II, pp. 492, 493.

The estate of a deceased person which did not thus pass to the wife or children was usually devoted to pious uses. Lyndwood, Provinciales (ed. 1679), p. 180.

The Statute of 31 Edw. III, c. 11, *ante*, deprived the ordinaries of the administration of intestate estates by giving them to the next of kin.

It is a settled principle of the ecclesiastical and probate courts that the right to administration follows the right to property in the intestate's chattels. 1 Woerner, Am. Law of Adm. (2d ed), § 235; 1 Williams, Exec. (10th ed.), p. 328.

The widow did not have the absolute right to administer her deceased husband's estate. Stat. 21 Hen. VIII, c. 5, *ante*. But the modern English practice is to give her preference.

Upon the death of a wife the right of administering on her estate belonged to her husband. Some authorities attribute his right to the Statute of 31 Edw. III, *ante*. *Jones* v. *Roe*, W. Jones 175; *Elliot* v. *Collier*, 1 Wils. K. B. 168; Sands's case, 3 Salk. 22. Others to the common law. *Watt* v. *Watt*, 3 Ves. Jr. 244, 246. But the right is expressly confirmed by Stat. 29 Car. II, c. 3, § 25, *ante*.

In the following jurisdictions in the United States the court in its discretion may grant administration to the widow, or next of kin (in some states children), or to both. Alaska, Annot. Codes (1907), § 774; Arkansas, Stats. (1904), Adm., c. 1, § 7; District of Columbia, Code (1911), § 276; Connecticut, Gen. Stats. (1902), § 318; Kansas Stats. (1909), § 3447; Maine, Rev. Stats. (1903), c. 66, § 18; Massachusetts, Rev. Laws (1902), c. 137, § 1; Michigan, Stats. (1913), § 11040; Minnesota, Gen. Stats. (1913), § 7287; Nebraska, Rev. Stats. (1913), § 1339; New Hampshire, Pub. Stats. (1901), c. 188, § 1; New Jersey, Comp. Stats. (1910), p. 3822; Oregon, Laws (1910), § 1150; Pennsylvania, Purdon's Dig. (1905), vol. 1, p. 1080; Porto Rico, Comp. Stats. (1911), § 1570; Rhode Island, Gen. Laws (1909), c. 312, § 10; Vermont, Pub. Stats. (1906), § 2758; Wisconsin, Stats. (1911), § 3807. Compare Delaware, Rev. Code (1915), §§ 3336, 3382; Maryland, Annot. Code (1911), Art. 93, § 18.

In the following jurisdictions the widow is preferred to the next of kin or children in the grant of administration. Alabama, Civ. Code (1907), § 2520; Arizona, Rev.

Stats. (1913), § 787; California, Code Civ. Proc. (1916), § 1365; Colorado, Annot. Stats. (1912), § 7903; Florida, Comp. Laws (1914), § 2339; Georgia, Annot. Code (1914), § 3943; Hawaii, Rev. Laws (1905), § 1849; Idaho, Rev. Codes (1908), § 5351; Illinois, Annot. Stats. (1913), § 66; Indiana, Annot. Stats. (1914), § 2742; Iowa, Annot. Code (1897), § 3297; Kentucky, Stats. (1915), § 3896; Mississippi, Code (1906), § 2024; Missouri, Rev. Stats. (1909), § 15; Montana, Rev. Codes (1907), § 7432; New Mexico, Stats. (1915), § 2224; New York, Code Civ. Proc., § 2588; North Carolina, Rev. Stats. (1908), § 3; North Dakota, Comp. Laws (1913), § 8657; Ohio, Ann. Gen. Code (1912), § 10617; Oklahoma, Rev. Laws (1910), § 6245; South Carolina, Code (1912), § 3605; South Dakota, Comp. Laws (1913), p. 479; Tennessee, Code (1896), p. 954; Texas, Civ. Stats. (1913), Art. 3281; Utah, Comp. Laws (1907), § 3812; Virginia, Code (1904), § 2639; Washington, Codes & Stats. (1910), § 1389; West Virginia, Code (1906), § 3258; Wyoming, Comp. Stats. (1910), § 5502.

If the deceased is a married woman, in the following jurisdictions the court in its discretion may grant administration to the husband, or next of kin (in some states children), or to both. Arkansas, Stats. (1904), Adm., c. 1, § 7; Connecticut, Gen. Stats. (1902), § 318; Maine, Rev. Stats. (1903), c. 66, § 18; Maryland, Annot. Code (1911), Art. 18; Michigan, Stats. (1913), § 11040; Minnesota, Gen. Stats. (1913), § 7287; New Jersey, Comp. Stats. (1910), p. 3822; Porto Rico, Comp. Stats. (1911), § 1570; Vermont, Pub. Stats. (1906), § 2758; Wisconsin, Stats. (1911), § 3807. Compare Delaware, Rev. Code (1915), §§ 3336, 3382; Maryland, Annot. Code (1911), Art. 93, § 18.

The absolute right of the husband to administration exists in the following jurisdictions. Alabama, Civil Code (1907), § 2520; Alaska, Annot. Codes (1907), § 776; Arizona, Rev. Stats. (1913), § 787; California, Code Civ. Proc. (1916), § 1365; Colorado, Annot. Stats. (1912), § 7903; Florida, Comp. Laws (1914), § 2339; Georgia, Annot. Code (1914), § 3943; Hawaii, Rev. Laws (1905), § 1849; Idaho, Rev. Codes (1908), § 5351; Illinois, Annot. Stats. (1913), § 66; Indiana, Annot. Stats. (1914), § 2742; Iowa, Annot. Code (1897), § 3297; Kentucky, Stats. (1915), § 3896; Massachusetts, Rev. Laws (1902), c. 137, § 1; Mississippi, Code (1906), § 2024; Missouri, Rev. Stats. (1909), § 15; Montana, Rev. Codes (1907), § 7432; New Hampshire, Judge of Probate v. Chamberlain, 3 N. H. 129; New Mexico, Stats. (1915), § 2224; New York, Code Civ. Proc. § 2588; North Carolina, Rev. Stats. (1908), § 3; North Dakota, Comp. Laws (1913), § 8657; Ohio, Annot. Gen. Code (1912), § 10617; Oklahoma, Rev. Laws (1910), § 6245; Pennsylvania, Purdon's Dig. (1905), vol. 1, p. 1082; Rhode Island, Gen. Laws (1909), c. 312, § 10; South Carolina, Code (1912), § 3605; South Dakota, Comp. Laws (1913), p. 479; Tennessee, *Fairbanks* v. *Hill*, 3 Lea 732; Texas, Civ. Stats. (1913), Art. 3281; Utah, Comp. Laws (1907), § 3812; Virginia, Code (1906), § 2639; Washington, Codes & Stats. (1910), § 1389; West Virginia, Code (1906), § 3258; Wisconsin, Stats. (1911), § 3807; Wyoming, Comp. Stats. (1910), § 5502.

If letters are not granted to the surviving spouse, they will usually be granted to the next of kin. The best general statement of the method of ascertaining the next of kin is found in 1 Williams, Exec. (10th ed.), pp. 328–334 where it is said by way of summary: "In the first place the children, and their lineal descendants to the remotest degree: and on failure of children, the parents of the deceased are entitled to the administration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins." In Illinois the Statute reads as follows: "Administration of the estate of all persons dying intestate shall be granted to some one or more of the persons hereinafter mentioned and they are respectively entitled to preference thereto in the following order: 1st. To the surviving husband or wife, or any competent person nominated by him or her. 2d. To the children or any competent person nominated by them. 3d. To the father or any competent person nominated by him. 4th. To the mother or any competent person nominated by her. 5th. To the brothers or any competent person nominated by them. 6th. To the sisters or any competent person nominated by them. 7th. To the grandchildren or any competent person nominated by them. 8th. To the

next of kin or any competent person nominated by them. 9th. To the public administrator or to any creditor who shall apply for the same." Annot. Stats. (1913), Par. 66.

In Massachusetts, as follows: Sec. I. "Administration of the estate of a person deceased intestate shall be granted to one or more of the persons hereinafter mentioned, who shall, subject to the provisions of the following section, be entitled thereto as follows: First, His widow or his next of kin, or the widow jointly with the next of kin, as the probate court may determine. Second, If the deceased was a married woman, her husband, if he is competent and willing to undertake the trust, unless it is necessary or proper to appoint some other person. Third, If all said persons are incompetent or evidently unsuitable for the discharge of the trust, or renounce the administration, or if without sufficient cause they neglect for thirty days after the death of the intestate to take administration of his estate, one or more of the principal creditors, after public notice upon the petition. Fourth, If there is no such creditor willing and competent to undertake the trust, any suitable person. Fifth, If there is no widow, husband or next of kin within this commonwealth, a public administrator in preference to creditors. Sec. II. Administration of the estate of an intestate may be granted to one or more of his next of kin or any suitable person, if his widow and all his next of kin resident in the commonwealth, who are of full age and legal capacity, consent in writing thereto. Notice of the petition may be dispensed with as if all parties entitled thereto had signified their assent or waived notice." Rev. Laws (1902), c. 137, §§ 1, 2.

In New York, as follows: "Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order: 1. To the surviving husband or wife. 2. To the children. 3. To the grandchildren. 4. To the father. 5. To the mother. 6. To the brothers. 7. To the sisters. 8. To any other next of kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as herein after provided. If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead. If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent. If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows: a. To the public administrator. b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate. c. To any other person or persons. If several persons have an equal right to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with, and upon the application of, a person entitled; or to a competent person or persons not entitled, upon the consent of all of the persons entitled to take or share in the estate who are within this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person." Code Civ. Proc., §2588; Laws (1914), p. 1792.

If there are no next of kin, the crown is entitled to the chattels of the deceased, and a nominee of the crown is appointed. Stat. 47 & 48 Vict. c. 71 (1884). In the United States there are officials known as public administrators who administer or who are entitled to administration of estates of persons dying without kin. 1 Woerner, Am. Law of Adm. (2d ed.), §§ 180, 240.

A creditor has no right to administration except by the custom of the court. 1 Williams, Exec. (10th ed.), p. 349. But in many of the United States by statute creditors are preferred after next of kin. 1 Woerner, Am. Law of Adm. (2d ed.), § 239.

ADMINISTRATION CUM TESTAMENTO ANNEXO. — If the person named as executor refuses to act, or dies before the testator, or is incapable of acting, the court will appoint an administrator *cum testamento annexo*. In absence of statute the court will ordinarily appoint the residuary legatee, as having the right of property. By Stat. 21 Hen. VIII., c. 5 (1529), *ante*, if the executor named refused to act the court was required to appoint the same persons as in the case of intestacy. But in spite of this provision the court commonly will grant administration *cum testamento annexo* to the residuary legatee in preference to the next of kin. 1 Woerner, Am. Law of Adm. (2d ed.), § 245; 1 Williams, Exec. (10th ed.), pp. 370–379.

ADMINISTRATION DE BONIS NON. If the sole or surviving administrator die not having fully administered the estate, the court will appoint an administrator *de bonis non*. The court as a matter of practice will appoint the person or persons who would be entitled to general administration. 1 Woerner, Am. Law of Adm. (2d ed.), § 247; 1 Williams, Exec. (10th ed.), pp. 382, 383.

ADMINISTRATION DE BONIS NON CUM TESTAMENTO ANNEXO. If the sole or surviving administrator *cum testamento annexo* die or be discharged without having fully administered, letters of administration *de bonis non cum testamento annexo* are granted. If the sole or surviving executor die intestate or be discharged not having fully administered similar letters will be granted. If, however, such executor has died testate in England, his executor succeeds to the first executorship. In such a case in the United States, however, an administrator *cum testamento annexo de bonis non* is appointed. 2 Schouler, Wills (5th ed.), §§ 1128, 1129.

ADMINISTRATOR PENDENTE LITE. During a controversy with reference to the appointment of an executor or administrator the court has power to appoint an administrator *pendente lite*. Apart from statute his powers are limited to the collection and preservation of the estate; but the tendency of legislation is to enlarge his powers. 1 Woerner, Am. Law of Adm. (2d ed.), § 181; 1 Williams, Exec. (10th ed.), pp. 398–403.

OTHER TEMPORARY AND LIMITED ADMINISTRATIONS. 2 Schouler, Wills (5th ed.), §§ 1132, 1133, 1135; 1 Woerner, Am. Law of Adm. (2d ed.), §§ 182–184, 248; 1 Williams, Exec. (10th ed.), pp. 385–397; 403–419.

BONDS. Stat. 22 & 23 Car. II., c. 10, §§ 1–3 (1671). Be it enacted by the King's most excellent Majesty, with the advice and consent of the Lords, Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the 1st day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, *viz.*,

§ 2. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time

after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of . And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

§ 3. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice. . . .

See *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 151; *Same* v. *Robertson*, 1 C. & M. 690; 1 Woerner, Am. Law Adm. (2 ed.), §§ 249–260.

SECTION V.

EFFECT OF PROBATE AND ADMINISTRATION — THEIR REVOCATION.

NOELL *v.* WELLS.

1 Lev. 235. 1668.

DEBT by the plaintiff, as executrix to her husband: the defendant pleads *Never executrix;* and on a trial the plaintiff produced the probate of the will in evidence: the defendant said, that the will was not a true, but a forged will. And the CHIEF JUSTICE, before whom it was tried, was of opinion, that he could not give such evidence directly contrary to the seal of the ordinary in a matter within his jurisdiction, whereupon a case was made for the opinion of the court, and a verdict taken for the plaintiff; but judgment to be stayed, if the court should be of opinion, that such evidence might be given; and upon motion the whole COURT held, that it could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia;* for those confess and avoid the seal. But he cannot give in evidence that another was executor; or that the testator was *non compos mentis,* for those falsify the proceedings of the ordinary in cases of which he is judge. But those are to be remedied by appeal.[1]

PLUME *v.* BEALE.

1 P. Wms. 388. 1717.

A BILL was brought by the executor of Doctor Plume, to be relieved against a legacy of £100, claimed by the defendant Beale, as given by the will of Doctor Plume.

The defendant Beale was no relation to the doctor, nor had done him any service, saving that now and then she had, during his illness, brought him some few slight cordials, in return for which, the doctor had ordered her a piece of plate.

This £100 legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left.

[1] See *Christianson* v. *King County,* 239 U. S. 356, 372; *Smith* v. *Steen,* 20 N. M. 436.

In most of the United States probate by a court having jurisdiction is conclusive as to personalty and realty. In a few states it is conclusive as to personalty but only *prima facie* evidence as to realty. *Belton* v. *Summer,* 31 Fla. 139; *Cochran* v. *Young,* 104 Pa. 333. Compare *Campbell* v. *Porter,* 162 U. S. 478; New York, Laws (1910), c. 578; Laws (1914), c. 443, p. 1775. See note to *Bolton* v. *Schriever,* 135 N. Y. 65, *ante,* p. 377.

But forasmuch as the will was proved by the plaintiff the executor in a proper court, that had a proper jurisdiction (it relating only to a personal estate), and more especially, for that the executor might have proved the will in the spiritual court, with a particular reservation as to this legacy, the COURT [LORD COWPER, C.] said, his remedy must be there, and dismissed the bill with costs.[1]

PACKMAN'S CASE.

6 Co. 18 b. 1595.

WILSON brought an action on the case on trover against Packman, and the case was such; a man died intestate, and the ordinary committed administration to a stranger, and afterwards the next of kin of the intestate sued a citation in the spiritual court, to have it repealed; pending which suit the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sold the goods of the intestate to the defendant: and afterwards the letters of administration are revoked by sentence, and the first sentence annulled and made void, and afterwards administration was committed to the plaintiff. And it was resolved that the action did not lie; and thereupon the plaintiff discontinued his action; and in this case a difference was taken between this suit by citation, which is to countermand or revoke the former letters of administration, and an appeal, which always is to reverse a former sentence, for the appeal doth suspend the former sentence; otherwise of a citation: and in this case forasmuch as the first administrator had the absolute property of the goods in him, without question he might give them to whom he pleased. And although the letters of administration be afterwards countermanded, and revoked, yet that cannot defeat the gift. But if the gift be by covin, it shall be void by the Statute of 13 Eliz. against a creditor, but it remains good against the second administrator; and if an administrator waste the goods, and afterwards administration is committed to another, yet any debtee shall charge him in debt; and if he pleads the last administration committed to another, the other may reply, that before the second administration committed, he had wasted the goods. *Vide* 17 Eliz. Dy. 339, the like case, and 34 H. 6. 14 a, b. Administration may be granted on condition, and it was holden in such case, if such administrator, before the condition broke, gives away the intestate's goods, and afterwards the condition is broke, yet the gift stands good. And observe, reader, a manifest

[1] Compare *Barnesly* v. *Powel*, 1 Ves. Sr. 284; *Marriot* v. *Marriot*, 1 Strange 666; *Segrave* v. *Kirwan*, Beatty 157; *Allen* v. *M'Pherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. D. 27; *Broderick's Will*, 21 Wall. 503. See *Dulin* v. *Bailey*, 90 S. E. (N.C.) 689.

In England a copy of the will with a certificate, called a probate, is given to the executor. On the right of a court to look at the original will for the purposes of construction, see 1 Williams, Exec. (10th ed.), pp. 445–448.

difference between this case and the case of 17 Eliz. For in our case the administration granted was lawful, and the gift also lawful, and the donee claimed in under the first administration, which the second administrator did intend to countermand and revoke; but in the case of 17 Eliz. the second administrator (who obtained the second administration by covin had with the defendant in the action without any recital of the first administration) did release to the defendant by covin to bar the plaintiff of his execution: it is there adjudged, that the said second letters of administration being by sentence reversed, and declared to be void, the defendant who was party to the covin being in execution should not have an *audita querela*. But that is not to be likened to our case, for there the defendant claimed by the second administration, which is declared to be void, and the first always in force, so that the second administration was never lawful; but in our case the first administration was lawful, until it was countermanded, and so a difference.[1]

ALLEN, ADMINISTRATOR v. DUNDAS.

3 T. R. 125. 1789.

THIS was an action on the case for money had and received to the use of the intestate, and to the use of the plaintiff as administrator: to which the defendant pleaded the general issue. And on the trial a special verdict was found, stating in substance as follows. The defendant, as treasurer of the navy, was indebted to the intestate in his lifetime in £58 13s. 6*d*. for money had and received to his use. Priestman died on the 2d of June 1784: on the 13th of August 1785, one Robert Brown proved in the Prerogative Court of the Archbishop of Canterbury, a forged paper writing, dated the 18th of May 1784, purporting to be the last will of Priestman, otherwise Handy; whereby he was supposed to have appointed Brown the sole executor thereof; and a probate of that supposed will issued in due form of law, under the seal of that court, on the same day, in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him £58 13*s*. 6*d*., being the whole balance then due from the defendant to Priestman. On the 21st of July 1787, Brown was called by citation, at the suit of John Priestman the father, and next of kin of the deceased, in the Prerogative Court of the Archbishop of Canterbury, touching the validity of such supposed will; and such proceedings were thereupon had in that court, that the will and probate were declared null and void; that Thomas Priestman died intestate; and that John Priestman the father was his next of kin. And on the 31st

[1] Compare *Baxter and Bale's Case*, 1 Leon. 90; *Semine* v. *Semine*, 2 Lev. 90; *Boxall* v. *Boxall*, 27 Ch. D. 220.

of March 1788, letters of administration of the goods, &c. of Thomas Priestman were granted by that court in due form of law to the plaintiff, as attorney of John Priestman. But whether, &c.

ASHHURST, J. I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted, that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it: but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it: this therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and acts at his peril: a payment in such a case is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject matter; and every person was bound to give credit to the probate till it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present; because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation: in the former the original sentence is as if it had never existed; in the latter, the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every person is bound by the judicial acts of a court having competent authority: and during the existence of such judicial act, the law will protect every person obeying it.

BULLER, J. The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff's counsel, first, that it is not a judicial act; and 2dly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the ecclesiastical court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good. And the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed: and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical courts have no jurisdiction, and

the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: but where they have no jurisdiction, their whole proceedings are a nullity. As to the case in Com. 150, I think it carries its own death wound on the face of it. It is an anonymous case, and is said to have been determined on the 5th of Ann. In the replication in that case, there is a traverse that the testator made such will by which A. B. was appointed executor. It is rightly admitted that such a traverse cannot be supported. The courts of common law cannot try whether it be a good will or not, for that depends on ecclesiastical law. The Chief Justice in giving the judgment of the court, begins with giving as his reasons, "that an executor derives all his authority from the testator himself; and that he of himself, as being executor, without anything more, has the power of disposing of the testator's estate. True it is, before an action brought a probate is necessary, but that is only requisite to ascertain the court that the plaintiff is executor." From this admission it appears that there are no means of ascertaining who is executor but by applying to the ecclesiastical court for a probate: so that the reason destroys itself. Then he proceeds to point out the difference between a citation and an appeal. Now if that distinction extend to the case of executors as well as administrators, it will decide the present case. But he goes on to add in that case, "but it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him." In that I differ from him; because an executor has an authority which a court of common law cannot dispute. The Chief Justice afterwards goes on to say, "that that case was not like the case of an officer who officiated without legal authority, as the deputy of the deputy of a steward, &c.; for rightful acts done by him are good, for he is an officer *de facto*, and in the immediate and open execution of his office. And the parties did not know whether he had authority or not." That is just the present case; for here there was an executor *de facto*, who had obtained a probate; and the defendant neither knew or could tell whether he was rightful executor or not, further than he was informed by the probate, which he could not dispute. Then the Chief Justice resorts to the argument of inconvenience, if a tortious executor should be permitted to dispose of the right and interest of a rightful executor. But I think that the inconvenience is clearly the other way; because, if there be a rightful executor, and he does not come forward, he is guilty of *laches*. Suppose such an one were to lay by for a number of years, and in the meantime all the debts were to be collected by another person who had obtained a probate as executor: those payments ought to be protected; for during all that time the debtors could not controvert his authority; and it is admitted that if actions had been brought in such cases, the debtors could not have made any

defence. Another thing to be observed in the case in Comyns is, that it was decided on the authority of a case in Ro. Abr. 919, which is there said was never denied. From that circumstance I am inclined to think it passed without much consideration; for the doctrine in Ro. Abr. is contradicted in 2 Lev. 90, and 1 Lev. 158 and 236. In the last of those cases, the objection was first made at *Nisi Prius:* but the point was reserved for the opinion of the court on a case (which shows that the practice of granting cases is not of very modern date, for that was in Charles the Second's time); and it was there resolved by the court that, on the plan of *ne unques* executor, evidence might be given that the seal of the ordinary was forged, or that there were *bona notabilia;* for they confess and avoid the seal. But they also held that evidence, that another, and not the plaintiff, was executor, or that the testator was *non compos mentis,* or that the will was forged, could not be admitted; for that would be to falsify the proceedings of the ordinary in cases of which he is judge. It seems therefore strange that the Chief Justice should have said in that case that the case in Ro. Abr. had never been doubted; because these cases determined the reverse of the doctrine there contained. Then as to the traverse in the case in Comyns, it is impossible to support it. The Chief Justice says that "the traverse is good; for whether a will or no will is a question triable by a jury; and the reason is, because the spiritual court had not the original jurisdiction of the probate of wills, and because as to trial the temporal courts have *quasi* a concurrent jurisdiction." Now this reason undoubtedly fails. The concluding reason there given is, "that the probate of a will concludes a person from saying there was no such will; but notwithstanding this matter may be brought to trial; for the producing a will under probate is only evidence that there was such a will. And though it is evidence of so strong a nature that no evidence shall be admitted against it, yet to plead that such a will was proved is no reason why this matter should not be tried." This reason is directly contradictory to itself; for, first, he says that the probate is only evidence of the will, and that it may be tried; and yet he adds, that it is conclusive, and that no evidence can be admitted against it. Therefore I think this case is destructive of itself. Another head of argument by the plaintiff's counsel was, that the payment in this case under the probate was not a compulsory one, and a case of bankruptcy was alluded to. But a determination on the bankrupt laws cannot govern the court in deciding this question. Those cases turn on a fraudulent preference given to one creditor over another: but even there the courts have never proceeded on the idea that a judgment is necessary to enforce payment; a threat is sufficient. And the question in those cases is, whether the payment under the circumstances be fair, or with a view to defraud the rest of the creditors.

GROSE, J. No doubt could ever have been entertained on this subject, had it not been for the case in Ro. Abr. and Comyns; which

struck me at first as being very strong cases to the point for which they were cited: but I am satisfied, by what has been said by my Brother Buller, that they cannot be law. The case in Comyns seems to be grounded on a false principle, namely, that the probate of a will gives no authority to the executor. But I think it does, and so much so that it cannot be traversed or denied. Gilb. Eq. Cas. 207, 8. Then the payment to the executor in this case was made under the judicial act of a court having competent jurisdiction on the subject, which could not be disputed. And therefore it is not like a payment under a forged bill of exchange or bond, for this was made under the authority of the probate, and not of the will. It has been said that there is a difference between a repeal of letters testamentary on appeal or on citation: however that may be, the ground of my opinion is that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a court having competent jurisdiction.

Judgment for the defendant.[1]

IN RE WEST.

[1909] 2 Ch. 180. 1909.

ACTION.

By her will dated February 25, 1898, Emma J. West devised and bequeathed her residuary real and personal estate to her executors and trustees upon trust for sale and conversion, and directed them to hold the net proceeds (after providing for debts, funeral and testamentary expenses, legacies, and annuities) upon trust for her children Charles, Josephine, Isabelle, and Clara in equal shares. Each share was settled as therein mentioned, the son taking a protected life interest, and the daughters life interests without power of anticipation.

By a first codicil dated October 17, 1902, the testatrix revoked the provisions for the settlement of Josephine's and Isabelle's shares and gave them their shares absolutely.

The second codicil of March 13, 1903, is not material.

By a third codicil dated July 27, 1903, the testatrix bequeathed one third of her preference and ordinary shares in J. & E. Atkinson, Limited, to Josephine, one third of the same shares to Isabelle, and one third of the same shares to her trustees upon the trusts of Clara's fourth share of residue.

The fourth codicil of April 2, 1904, is not material.

The testatrix died on July 17, 1904, and her will and four codicils

[1] See *Foulke* v. *Zimmerman*, 14 Wall. 113; *Thompson* v. *Samson*, 64 Cal. 330; *Fallon* v. *Chidester*, 46 Iowa 588; *Brown* v. *Hill*, 27 Miss. 44; *Wooley* v. *Clark*, 5 B. & Ald. 744; *Boxall* v. *Boxall*, 27 Ch. D. 220; *Craster* v. *Thomas*, [1909] 2 Ch. 348.

were proved on August 30, 1904. After first transferring the shares into their own names as shareholders, the executors and trustees duly transferred one third of the shares to Josephine and one third to Isabelle and retained one third as trustees of Clara's settled share.

On December 8, 1907, the testatrix's sister-in-law, Mrs. King, died. Among her papers was a sealed envelope on which the testatrix had written "To be opened only after the death of Mrs. King should I predecease her. If occasion demands to be returned to Emma J. West 19 Clevedon Square Hyde Park W."

This envelope contained a fifth codicil dated June 16, 1904, whereby the testatrix revoked the third codicil and bequeathed a fourth part of the Atkinson shares to each of her children Josephine, Isabelle and Charles absolutely, and a fourth part to Clara in settlement according to the will.

On January 9, 1908, the original probate of the will and four codicils was revoked, and on November 28, 1908, new probate of the will and five codicils was granted to the same executors.

In the meantime, namely, on February 26, 1908, the plaintiff Charles brought this action to recover one fourth of the shares and one fourth of the dividends from the testatrix's death from the defendants Josephine, Isabelle, and Clara and the trustees respectively. Josephine and Isabelle admitted the plaintiff's right to the shares and transferred their proportion pending the action. Clara was willing that the trustees should transfer on the order of the Court.

The defendants did not, however, admit the plaintiff's right to share in any dividends paid before December 8, 1907, when the fifth codicil was discovered.

SWINFEN, EADY J. (after stating the facts). The defendants do not dispute that the plaintiff is entitled to the shares bequeathed to him by the fifth codicil, which were erroneously but inadvertently transferred to the wrong persons, but they contend that the plaintiff is not entitled to the dividends which in the meantime they have received and retained for their own use.

It is exceedingly difficult to see any principle upon which the defendants, whilst conceding that they are not entitled to retain the shares given to their brother by the fifth codicil, are yet entitled to retain for their own use the dividends on those shares which were not really bequeathed to them at all. It is said that where a legatee has been ordered to refund either in respect of a pecuniary legacy or in respect of a share of residue, such refunding under the rule laid down in *Gittins* v. *Steele* 1 Swans. 199 is without interest; but it appears to me that the reasoning has no application to a case of this kind, where the legacy is of specific shares, because upon the assent of the executors those shares vest in the legatee, and the assent, when given has relation to the time of the testatrix's death. In the case of a specific legacy it is well established that immediately after the executors' assent the legacy vests in the legatee, and he can maintain an

action at law in respect of it. If the plaintiff has a legal right to the shares as from the testatrix's death, it seems to me that he has also a legal right to the interest or dividends.

In Williamson Executors, 10th ed. p. 1108, it is said: "The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the under-tenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests."

In *Saunders' Case* 5 Rep. 12b. it is said that "if lessee for years devises his term to another, and makes his executors, and dies, the executors do waste, and afterwards assent to the devise, in that case, although between the executors and the devisee it hath relation, and the devisee is in by the devisor, yet an action of waste shall be maintainable against the executors in the tenuit."

It was rather suggested that the assent, if any, in this case under the second probate was subject to the intermediate improper application of the dividends, but I cannot accept that view. The legacy was assented to and the usual consequences must follow. The legatee became entitled to the legacy as from the testatrix's death.

With regard to the analogy between a pecuniary legacy or share of residue and a specific legacy, it is pointed out in Williams on Executors, 10th ed. pp. 1566, 1567, that no action at law lies against an executor for a general legacy or share of residue. "But the law is different with respect to specific legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor." The executor can only assent to the legacy in favour of the legatee to whom it is given, not in favour of a stranger, and the only person to whom these shares that I have to deal with were given was the plaintiff.

I therefore determine that the plaintiff is entitled to the shares bequeathed to him, that he is entitled to these shares as from the testatrix's death, and that this bequest carries the intermediate income, including the right to recover that income from those who have received it.

KITTREDGE *v.* FOLSOM, EXECUTOR.

8 N. H. 98. 1835.

PARKER, J.[1] . . . Upon the fourth plea, with the replication and rejoinder thereto, several questions have arisen. The plea alleges that the original administration, as executor of the will of Benjamin

[1] The statement of facts and part of the opinion are omitted.

Kittredge, was granted to the defendant, 15th of February, 1832, and not before, and that the suit of the plaintiff was commenced before the expiration of one year from that time. To this the plaintiff replies, that the defendant was appointed, by the judge of probate, administrator of said estate, March 17, 1830, and took upon himself that trust — that said appointment was the first and original grant of administration, and that the suit was not commenced before expiration of one year from said 17th of March, 1830. The rejoinder admits these facts, but sets forth that this was a grant of administration as upon an intestate estate; that afterwards, an instrument purporting to be the last will of said Benjamin Kittredge, and purporting a disposition of his whole estate, was presented May 6, 1830, for probate, before the judge of probate; that the same was fully proved and approved in the Supreme Court of Probate, at January Term, 1832; that the plaintiff was named executor in said will, and on his refusal, the defendant, — and that on the plaintiff's refusal, administration under the will, with letters testamentary on said estate as a testate estate, was granted to the defendant, which administration is the same as that set forth in his fourth plea.

The first question raised by the demurrer is upon the sufficiency of this rejoinder. The Statute, as we have seen, provides that no action for a cause of action against the deceased, shall be sustained against an executor or administrator, if commenced within one year after the original grant of administration. This suit was commenced June 2, 1832. If, therefore, the administration under the will granted to the defendant on the 15th of February, 1832, is to be regarded as the original grant of administration in this case, the action was in fact commenced before the period when it could rightfully have been instituted; but if the administration taken by the defendant March 17, 1830, may be regarded as an original administration, the rejoinder is insufficient.

That the latter was the first actual administration is apparent; and unless that administration was entirely void, by reason of the existence of the will which has since been proved, there seems to be no objection to holding it an original administration for the purpose of this suit.

The Statute requires the exhibition of the demand to the executor or administrator against whom the suit is commenced, before its institution; but the limitation of the term of one year in which it may not be commenced does not date from the appointment of the administrator against whom the suit is instituted, but from the time of the original grant of administration, to whomsoever it may be made. It can be of no consequence, therefore, that the defendant has received an authority to administer the estate as executor, under the will, within a year prior to the time when the suit was instituted, if his appointment as administrator, prior to that time, was of such validity that it can be regarded as an original grant of administration upon the estate.

It is admitted that the question is, whether the administration granted to the defendant, as upon an intestate estate, was or was not a nullity; and it is contended that it was wholly void, and authorities are cited to show that all acts done under it are entirely void, and of no effect.

The law is laid down in 1 Williams on Executors, 367, that if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; and for this the case of *Abram* v. *Cunningham*, reported 2 Lev. 182, T. Jones, 72, and in several other books, is cited.

But in the next page of the same writer it is said, "It should seem, however, that as between the rightful representative, and the person to whom the executor or administrator under a void probate or grant of letters has aliened the effects of the deceased, the act of alienation, *if done in due course of administration*, shall not be void. Thus in the case of *Graysbrook* v. *Fox*, above mentioned, it was laid down by the court that if the sale had been made to discharge funeral expenses, or debts which the executor or administrator was compellable to pay, the sale would have been indefeasible forever." 1 Williams 368: and so is the case, *ride* 1 Plowd. 282.

Now, how anything can be done in due course of administration, where the administration and everything done under it is merely and wholly void, it is difficult to discover. The due course of that which had no rightful existence, but was a mere nullity, would seem to be the due course of wrong, or nonentity, and presents a solecism somewhat worse than two original grants of administration on the same estate. The position, also, that a purchaser can obtain an indefeasible title from the void act of one whose supposed authority is a mere nullity, seems to have more of legerdemain than of law in it.

Again — It is said in the same author, "It must be observed that whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bona fide* payment to the executor or administrator, of a debt due to the estate, will be a legal discharge to the debtor." 1 Williams 370. That is to say, that the payment of a debt to him who has no authority to receive it, and whose act in receiving it is a void act, is a good discharge to him who owed the debt.

In *Allen* v. *Dundas*, 3 D. & E. 125, the court held that payment to an executor who had obtained probate of a forged will was a discharge to the debtor, notwithstanding the probate was afterwards avoided in the ecclesiastical court; on the principle that the debtor could not have controverted the title of the executor so long as the probate was unrepealed, and might well pay when he could make no defence. See also 8 East 189; Bac. Abr., Executors, &c., E. 13.

So where administration is granted, and afterwards there appears to be an executor, if the administrator has paid debts, legacies, or

funeral expenses, he may retain, because he was compelled to pay; and the true executor has no prejudice, for he would have been bound to pay them. And in *Graysbrook* v. *Fox*, Weston, Justice, was of opinion that the sale of the goods by the administrator was indefeasible, although it was not shown that they were sold to discharge debts or funeral expenses. 1 Plowd. 279.

There is evidently an inaccuracy in the use of the term *void*, in many instances in the books, upon this and other subjects; and the attempt to reconcile all the authorities upon the matter now under consideration must be in vain. An administration granted by the competent authority, upon a proper case made, can with no propriety be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. 6 Co. 19, *Packman's Case;* 2 Lev. 90, *Semine* v. *Semine*. The acts of such administrator must be quite as valid as those of an executor under a will which has been revoked by the testator. The grant of administration confers an existing authority, which cannot be resisted or disregarded until the will appears. 1 Lev. 235, *Noel* v. *Wells*. The administrator in such case comes into his office by color of an authority. Plowd. 282. He is administrator *de facto*, and his acts, done in due course of administration, must be valid, at least so far as third persons are concerned. 7 N. H. R. 131. A distribution to those not entitled may perhaps form an exception. The circumstance that an executor is said to derive his authority from the testator cannot affect the principle; for until it appears that the deceased has exercised the power, and made an appointment, the judge of probate has the right, and is bound to grant administration. The attempt, therefore, to draw a distinction between a grant of administration in derogation of the right of the executor, and one in derogation of the right of the next of kin, holding the former void, and the latter only voidable, is not well sustained. The judge of probate has jurisdiction to allow a will, if one is presented, and if not, to grant administration. He may well grant the latter when there is no evidence that the former has any existence, and his act in doing so is not to be held entirely void, because in derogation of the right of an executor, who has perhaps occasioned the act by his own neglect.

It is said that there are many things which an executor may do before probate. 1 Bac. Abr., Executors, &c., E. 14; 3 N. H. R. 517, *Strong* v. *Perkins*. But where an administration has been granted, an individual, by virtue of being named executor in a paper purporting to be a will, cannot control the acts of such administrator except by a probate of the will. In no other way can it appear that the administration is not well granted; for the will may be entirely ineffectual by reason of a want of sanity in the testator, or because it was procured by fraud, or has been revoked, &c.

And it may well deserve consideration, whether under our Statute

of July 2, 1822 (which provides that no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge of probate), an individual named executor can do any act as such until after the probate of the will.[1] The bonds are to be given to the judge upon the probate of the instrument.

The defendant in this case, under his first appointment as administrator might have commenced a suit upon a demand due to the estate, and have prosecuted it to judgment if the time had permitted, and no defence could have been made to it. The production of a will without probate would have been of no avail. 16 Mass. R. 442, *Dublin* v. *Chadbourne;* 1 Pick. 547, *Laughton* v. *Atkins;* 1 Pick. 114, *Shumway* v. *Holbrook;* 4 D. & E. 260, *The King* v. *Netherseal.*

So a suit might have been commenced against the defendant as administrator, on the lapse of a year; and to such suit the existence of a will without probate, or a plea that he was not rightful administrator, would have been no bar.

Payment, then, made to him, *bona fide*, must operate as a discharge of the debtor; and payment by him of a debt which the deceased owed, would be a valid act, for which he might retain, if the estate was solvent.

How far notice of a will might have afterwards affected his liability to a third person who was rightful executor, it is not necessary now to consider. 5 B. & Ald. 744, *Woolley* v. *Clark.*

Had this suit been commenced against him as administrator after the lapse of a year without the production of the will, he must have plead to the merits. Perhaps had the will in such case been proved before trial, and a third person been executor, he might have plead the matter in bar of the further maintenance of the suit.

But we see no sound principle upon which he could have done this had he himself, being the executor, taken letters testamentary during the pendency of the suit. There would in such case be no sufficient reason why the suit, which had been well commenced, should be defeated, in order that another should be instituted against him for the same cause, describing him as executor instead of administrator. 5 N. H. R. 342, *Giles* v. *Churchill.* He might have paid as administrator, and been protected. He might continue the defence, if he thought proper, under his character as executor.

So we think a suit commenced by him as administrator before probate could not have been defeated by a plea that since the last continuance he had proved the will, and been accredited as executor instead of administrator. It would be a mere change of his title of office, so far as the prosecution of such suit was concerned. It would be otherwise in case a third person had been appointed executor.

We have not, therefore, laid out of consideration the circum-

[1] See *Will of Somervaill*, 104 Wis. 72.

stance that the same individual who took the administration is the rightful executor, because his acts might in our opinion be continued; and no doubt all he had done under the administration, not in conflict with the provisions of the will, may be carried into the account of his administration, and allowed in the probate court, as if he had acted as executor in the first instance.

Upon the facts in this case, then, we hold that the grant of the administration on the 17th of March, 1830, was the original grant of administration within the terms of the Statute. Whether we must have arrived at a different conclusion had that grant been to a third person, and the suit commenced against the defendant before the expiration of a year from the probate of the will, we do not determine. The fact that the acts of such administrator, not in derogation of the provisions of the will, must be held valid as far as third persons were concerned, would certainly tend to give such an administration the character of an original administration within the meaning of the Act. The circumstance, however, that the executor might not have had knowledge of the condition of the estate, or have been able to collect the assets so as to make payment, must be weighed in such case, and upon this we give no opinion.[1] . . .

HEWSON *v.* SHELLEY.

[1914] 2 Ch. 13. 1914.

PHILLIMORE, L. J.[2] On January 30, 1899, one George Francis Hewson died leaving a widow, no children, three nieces who were his co-heiresses at law, and the same three with three other nephews and nieces his next of kin. He appears to have stated to his wife shortly before his death that he had made a will and left everything to her. But after diligent search no will could be found. The widow therefore took out general letters of administration, collected and divided the personal estate, and ultimately on October 13, 1902, sold and conveyed his real estate, being a farm in Hants, to the defendant Sir John Shelley for 3500*l*. A part of the proceeds was retained to secure the widow's dower, and the rest was divided between the co-heiresses. The sale was apparently made with the consent of the co-heiresses but in exercise of the legal title of the administratrix. It does not distinctly appear whether it would or would not have been necessary for payment of debts.

[1] *Meek* v. *Allison*, 67 Ill. 46; *Schluter* v. *Bowery Savings Bank*, 117 N. Y. 125; *Barkaloo* v. *Emerick*, 18 Ohio 268; *Zeigler* v. *Storey*, 220 Pa. 471; *Price* v. *Nesbit*, 1 Hill Eq. 445; *Franklin* v. *Franklin*, 91 Tenn. 119, *accord*. *Fallon* v. *Chidester*, 46 Iowa 588, *observe*. Compare *Waters* v. *Stickney*, 12 Allen 1; *Besançon* v. *Brownson*, 39 Mich. 388; *Kelly* v. *Davis*, 37 Miss. 76.

[2] The statement of facts and the concurring opinions of Cozens-Hardy, M. R., and Buckley, L. J., are omitted.

On September 2, 1911, the widow died. Her executor, looking over and for papers, discovered at the back of a bureau a holograph will of George Francis Hewson. This discovery was made on November 11, 1911. The will had been made on April 24, 1894. By it the testator appointed four executors, one being his wife, and devised his estate to his wife for life with remainder to a relative who was not heir-at-law, nor one of the next of kin. On February 9, 1912, the two surviving executors, one being the devisee of this estate, obtained recall of the letters of administration and probate of the will; and on January 14, 1913, they brought this action against the purchaser, Sir John Shelley, his mortgagees, and the tenant in occupation to recover the estate.

ASTBURY, J. has decided with reluctance and in obedience to authorities, which were probably binding upon him as a judge of first instance, in favour of the plaintiffs, and it is from this judgment that the present appeal is brought.

The principle upon which the learned judge decided was that this administration, there being in existence though unknown a will appointing an executor, was void — not voidable but void.

Before us the counsel for the respondents have preferred to support the judgment on the ground that the administratrix in the circumstances acquired no title to any property, at any rate not to the real property of Captain Hewson, and having no title could pass none on. The case has been most ably and learnedly and, I might add, courageously argued by counsel on both sides; and it necessitates a research into first principles.

I propose, in the first instance, to deal with the matter apart from the effect of the Land Transfer Act, 1897, and to consider the case as if we were dealing with a conveyance of leaseholds, chattels real.

It is said for the respondents that the property of a deceased person vests in the executor immediately upon the death and by the mere effect of the will. In some senses this is true. It is true that an executor can properly act at once, that he can collect his testator's goods, receive and give discharge for debts due, and alien the goods including chattels real in due course of administration, subject always to the condition that he will some time or another satisfy the Court that has jurisdiction over the subject-matter that there is a will and that he is the executor. But till he has proved it or till it has been proved to the Court, till it has become probatum, his title is not certain, and in that way is not complete.

The Statute of Westminster the Second, c. 19 (A.D. 1285), recognizes that the personal property of a person dying intestate passes to the Ordinary, making provision that in future the Ordinary shall be responsible for the deceased's debts so far as the assets extend. Subject to this provision the Ordinary remained as before entitled to dispend the goods of the deceased to such pious uses as he thought fit. Before and after this Act an administrator was the mere bailiff

or deputy of the Ordinary whom he selected at his will and pleasure, who had no independent right and could not bring an action any more than a sequestrator appointed by the Ordinary: *Harding* v. *Hall* 1842, 10 M. & W. 42; Phillimore on Ecclesiastical Law, 2nd ed. p. 375.

The Act 31 Edw. 3, c. 11 (A.D. 1357), restricted the power of selection and gave the administrator, called in the Act the deputy, power to sue as an executor could: see *Hensloe's Case* 9 Rep. 40a. The Act 21 Hen. 8, c. 5 (A.D. 1529), further limited the Ordinary in his choice of an administrator.

At some stage in the history of our law (when it is not necessary to determine) the Ordinary became bound to allow a *pars rationabilis* to the widow and next of kin.

But it was not till the Statute of Distributions (22 & 23 Car. 2, c. 10, A.D. 1670) that the Ordinary became bound to distribute "the surplusage" (those are the words of the statute) to the widow and next of kin in shares and in an order of succession statutably defined. By the same Act the Ordinary was directed to take bond with sureties in a form provided by it from the administrator to ensure the latter's due administration. The condition of the bond is important for another part of the argument. I rather think that though the word "administration" is used in the Act of Henry VIII. the Act of Charles II. is the first which uses the word "administrator."

From the date of the Act of Charles II. the Ordinary ceases to have any interest in the administration of the estate of an intestate. He has no discretion as to the distribution of the "surplusage." He becomes a mere judicial officer, declaring the intestacy, determining it *inter partes* if there is a dispute, appointing as administrator the person who is entitled by law to be appointed, determining in what was called "an interest" suit who is the person entitled, if there is a dispute, and taking his established fees of office or Court.

As soon as the temporal Courts had come to appreciate this position their jealousy of the Ordinary ceased, as is stated by Lord Redesdale in *Doyle* v. *Blake* 1804, 2 Sch. & Lef. 231. It is perhaps unfortunate that *Abram* v. *Cunningham* 2 Lev. 182 should have come up for a decision a year or two before the Act of Charles II.

I will deal with the authorities later on, but before beginning with them in detail, I would observe that in some of them it is put as if the jurisdiction of the Ordinary was conferred upon him by the statute 31 Edw. 3, c. 11, and was restricted by that statute to cases of intestacy. The jurisdiction was not conferred by that statute or even by the earlier one of Westminster the Second. The jurisdiction, or, more properly, the vesting of the estate of an intestate with power to distribute it subject to certain provisions as he thought proper, is recognized by the Statute of Westminster the Second as already existing. The Statute of Edward III. requires the Ordinary where the estate has become vested in him to pass it on to an administrator,

whereas before the administrator was only his deputy created for his own ease and convenience. Still, however, if a special construction be put upon the word "intestate," there is no objection to saying that it is only in case of an intestacy that the estate vested in the Ordinary, and could be committed or passed on by him to an administrator. That some special meaning must be put upon the word "intestate" is obvious. No one has ever denied the power of the Ordinary to grant administrations *cum testamento annexo* or *de bonis non;* and it will appear as I proceed that though administrations *lite pendente, durante minore ætate,* and *durante absentia* have been disputed, ultimately the power of the Ordinary to grant them was established, and when I say this I do not mean established by 38 Geo. 3, c. 87, or by the Court of Probate Act (20 & 21 Vict. c. 77), but by decisions.

The question, therefore, narrows itself down to this, if we look at it from the point of view of jurisdiction, whether a deceased who leaves no known will, or at any rate no known executor, may be treated as intestate. If he may be so treated, in other words, if a general administration may lawfully be granted and not be void, though it appear afterwards that there is a will with a living executor who consents to act, it will be strange if the acts of that administrator validly appointed must be deemed invalid, and if though authorized to administer the estate of the deceased he has no such title to it as to enable him to dispose of it in due course of administration.

Now I come to the cases.

I have read and re-read the case of *Graysbrook* v. *Fox* 1 Plowd. 275, and I think there is no explaining of it away. It was there held on a clean case raised by demurrer that, as against an executor who subsequently obtained probate, the title of a purchaser to goods sold to him by a previous administrator was worthless. And in the case of *Abram* v. *Cunningham* 2 Lev. 182. a title given by an administrator *de bonis non* was held worthless as against the claim of an administrator to the executor. It is true that in both cases the Court may have well thought that the merits were with the successful party and that this might possibly account for neither case going further on appeal. In the first, the defendant could only allege that he had bought the goods from the administrator a month after death and twelve days after the letters of administration. And in the second case the sale was made after the administrator had been cited to bring in his letters so that they might be revoked, and only two days before they were revoked. But as I have said each case purports to be a clean decision on the point of law. The criticism on the judgment of the majority of the Court in the first case is that they had not the courage of their opinions. They start by saying that the administration was merely void, and yet one of them, Walsh, J., with the concurrence of Dyer, C. J., and with the concurrence of the minority judge, Weston, J., said (p. 282) if the defendant had

pleaded that the goods had been sold to him to raise money in discharge of the funeral or of the debts of the deceased, the sale had been good and indefeasible. On what principle it is difficult to see. If the estate of the deceased had been vested in the Ordinary and had been passed by him to the administrator because there was an intestacy in the sense that there was no will, surely the administrator could make a good title, and it would not be for the purchaser to inquire the object of the sale; but if the estate vested by law in the executor immediately on the death without probate and probate is only necessary to perfect the evidence of title, one does not see how the administrator got title or could pass a title for any purpose. Another criticism is that Lord Dyer seems in part to found himself on a case in the Year Book 7 Edw. 4 which is in apparent contradiction to the decision which he gives.

Abram v. *Cunningham* 2 Lev. 182 is a more extreme case because there the title was in fact tried between two administrators. However, those cases have found their way into the text-books, and have been recognized as law in comparatively recent times. Kay, J., distinguished the second in *Boxall* v. *Boxall* 27 Ch. D. 220, where there was the fortunate accident that the will appointed no executor. Neville, J. escaped from it by proceeding on the Indian Succession Act, 1865, in *Craster* v. *Thomas*, [1909] 2 Ch. 348. *Woolley* v. *Clark* 5 B. & Al. 744 is, I think, distinguishable. It was not an action against the purchaser from an administrator, but against the administrator himself, who under an administration *cum testamento annexo* sold property at his peril at a time when he had notice of a later will which ultimately received probate. Warrington, J., moreover, in *Ellis* v. *Ellis* [1905] 1 Ch. 613 purported to follow the two old cases, and added his sanction to their authority.

On the other hand, there has been a current of opinion in an opposite sense. In the Year Book 7 Edw. 4, 12 and 13, Littleton, J., with whom Newton, J., and Danby, J., agreed, held that the Ordinary may well grant administration in the meantime, that is, before the will is known, or it may be even before the executor has come forward and sought for probate, but by the probate of the testament the power of the administrator is determined; and the decision appears to have been to that effect. This means that the administrator gets and can give a good title subject to its being determined by the production of a will with an executor and perhaps also probate. Whether it be necessary, as is the modern practice, first to recall the letters of administration, or whether the power of the administrator ceases *ipso facto* upon his knowledge that there is a will, is a point immaterial for the present discussion.

The effect of *Graysbrook* v. *Fox* 1 Plowd. 275 no doubt is given in Rolle's Abridgment at p. 919, but the doctrine of the Year Book case already cited appears at p. 907. I have mentioned the bond required by the Statute of Distributions. That contemplates that

administration may be committed though there be a will, and only requires of the administrator that he should bring in his letters upon knowledge of it. Again the Courts have held that such an administrator or an executor under a forged will can give a good discharge to the deceased's debtors: see *Allen* v. *Dundas* 3 T. R. 125, *Woolley* v. *Clark* 5 B. & Al. 744, and *Prosser* v. *Wagner* 1 C. B. (N. S.) 289. And then there are the peculiar cases of administrations *lite pendente, durante minore ætate, durante absentia, durante animi aut corporis vitio.*

As to administration *lite pendente*, consistently with the view that the Ordinary has no jurisdiction, or, if it be put the other way, no property to vest, where there is an executor, a Court of common law held in the case of *Frederick* v. *Hook* 1 Carth. 153 that such an administration passed no title. But in *Walker* v. *Woollaston* 2 P. Wms. 576 the contrary was decided by the Court of Common Pleas after an able and suggestive argument by Mr. Peere Williams, and has since obtained as law. Sir George Lee, Judge of the Prerogative Court, remarks somewhat drily in *Maskeline* v. *Harrison* 2 Lee, 258 on the change of view of the Common Law Courts in this matter. Lord Redesdale in *Doyle* v. *Blake* 2 Sch. & Lef. 231 has some pertinent observations to the effect that some of the old cases could scarcely be supported on principle. He appears to have held that an administration was not a mere nullity but only repealable.

As to administration *durante minore ætate*, no doubt it rested after a time upon the express words of the statute 38 Geo. 3, c. 87. But it had been established before in *Piggot's Case* 5 Rep. 29a, with which the next case — *Prince's Case* Ibid. 29b — when properly considered agrees. (See also *Sir Moyle Finch's Case* [1606] 6 Rep. 63a, 67b).

As to administration *durante absentia*, the case of *Webb* v. *Kirby* 7 D. M. & G. 376 was relied upon for the plaintiffs, because there the Court held that a title derived from an administrator *durante absentia* was not certain enough to be forced upon a purchaser; but the reason given is not that such an administrator had no estate, but that his estate only lasts during the absence and life of the executor, and there could be no constat that the executor was still alive.

As to administration *durante animi aut corporis vitio*, no direct authority as to its validity or otherwise has been cited; but it is classed with the other special administrations in Oughton's Ordo Judiciorum, titulus 219, note A; and in Burn's Ecclesiastical Law (the edition by the late Sir Robert Phillimore, vol. iv. p. 386), where authorities are cited.

Both administrations *durante minore ætate* and *durante absentia* seem to be recognized by the Court of King's Bench in *Slaughter* v. *May* [1704] 1 Salk. 42. With regard to administrations *durante absentia*, there is this remarkable observation, that they were granted

concurrently with the practice of giving administration to the attorney of an absent executor: see *In the Goods of Earl* L. R. 1 P. & M. 450.

Then there are some isolated and remarkable cases which one may almost call cases of administration *quousque*: *In the Goods of Metcalfe* 1 Add. 343, *In the Goods of Campbell* 2 Hagg. Eccl. 555, and the more recent case in the Probate Division of the High Court of Justice, *In the Goods of Wright* [1893] P. 21, which, if sound, must be supported on the principle that administration can be validly granted limited to the time when a will known to have been in existence after the death of the testator is brought in for probate.

How any of these administrations could be other than traps for the unwary if they did not enable the administrator to pass property, how if they do enable an administrator to pass property they are consistent with a theory that the property immediately on death vests in the executor and cannot be divested, even temporarily, by the Ordinary or the Court of Probate, I fail to understand. It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of the deceased for the repose of which masses were to be provided, the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a will. No doubt there is much hardship upon legatees who may find that possibly owing to the supineness of an executor, or the fraud of those about the deceased at his death, a will is not proved till the estate has been already dispersed amongst the next of kin. I quite recognize this. I observe that in Oughton in the same place which I have quoted it is said that by the course of the Prerogative Court letters of administration were never granted till at least fourteen days after death, and in one of the authorities I saw it stated that an administrator ought not to distribute among next of kin under a twelvemonth, or does so at his peril. Sect. 5 of the Statute of Distributions seems to support this. If this be the law I am well satisfied. To hold otherwise than as we are holding would make all titles of the representatives of dead persons uncertain. It is not only that an administrator may be succeeded by an executor, but the executor under one will may oust the executor of another, and the executor of a will which turns out to be forged may have to give place to an administrator, as in *Allen* v. *Dundas* 3 T. R. 125. It is not as if we were asked to decide that the mere discovery of a will avoided all the acts of the administrator. If the will names no executor, if the executor be dead leaving no executor, if he or his executor if he takes his place refuses to take out probate and accept the executorship, the title of the administrator would, I gather, confessedly prevail. Those who have purchased goods from an administrator may

find their title depend on the caprice of an executor or of an executor's executor.

In the Court of Appeal I am not prepared to follow the actual decisions in the cases of *Graysbrook* v. *Fox* 1 Plowd. 275 and *Abram* v. *Cunningham* 2 Lev. 182, in spite of the amount of authority and acceptance which they have enjoyed. Because:

(1.) The reasoning in the principal case lays down no consistent rule.

(2.) It is in conflict with the earlier case in the Year Book.

(3.) The two cases were decided at a time of unfortunate jealousy of the Courts Christian.

(4.) They are in conflict with the principles established by a body of unquestioned authorities.

(5.) So to decide would be to establish that a number of void orders are made as matters of course by the High Court of Justice.

(6.) Such a decision would put serious difficulties in the way of the realization of the estates of all deceased persons.

If this, therefore, were a case of chattels real I should hold that the administrator had a valid title and could make a good sale.

It being a case of freehold I have next to consider the Land Transfer Act, 1897, ss. 1, 2, 11, and 24.

It was not to be supposed that this Act would give an executor or administrator a better title to freeholds than he had to leaseholds. But it is to be supposed and is, I think, the case that it gives him the same title. This being so, the Act seems to me of value as supporting the view which I have taken as to the previous state of the law. Freeholds are to vest in the personal representative from time to time. Personal representative is defined to mean executor or administrator. The words are apt for this very state of circumstances. He who for the time is clothed by the Court with authority as personal representative is to have the freeholds vested in him.

I have not thought it necessary to consider the arguments of counsel for the appellant founded on the provisions of the Court of Probate Acts of 1857 and 1858 or upon s. 70 of the Conveyancing Act, 1881.

I am of opinion that this appeal should be allowed and that judgment should be entered for the appellant.[1]

LOCKSMITH *v.* CRESWEL.

2 Roll. Ab. 399. 1634.

If a man dies possessed of certain goods, and then a stranger takes and converts them to his own use, and then administration is granted to J. S., this administration will relate to the death of the testator,

[1] The cases of *Graysbrook* v. *Fox*, Plowd. 275, *Abram* v. *Cunningham*, 2 Lev. 182, and *Ellis* v. *Ellis*, [1905] 1 Ch. 613, must be considered overruled.

so that J. S. can maintain an action of trover and conversion for this conversion before the administration granted to him. Adjudged Tr. 10 Car. B. R., between *Locksmith* and *Creswel*, this being moved in arrest of judgment after verdict for the plaintiff.[1]

FOSTER, ADMINISTRATOR *v.* BATES AND OTHERS.

12 M. & W. 226. 1843.

ASSUMPSIT by the plaintiff, as administrator of E. Pollard, deceased, for goods sold and delivered by the intestate, and also for goods sold and delivered by the plaintiff after his death, and before administration granted, and on an account stated with the plaintiff.

Plea, *Non assumpsit.*

At the trial before ROLFE, B., at the London sittings after last Trinity Term, it appeared that the defendants were partners in a company called the West African Company, trading to the coast of Africa, and that one Oldfield was their agent at Fernando Po. The goods in question had been sent by Pollard from this country to Africa for sale; he afterwards died intestate; and after his death, Oldfield, the defendants' agent, purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to Pollard, and brought this action for the price of the goods. It was objected at the trial, that the plaintiff was not entitled to recover, as the letters of administration did not relate back to the time of the death of the intestate, so as to vest in the administrator the right to sue on a contract made after his death. The learned judge, however, left the case to the jury, who found a verdict for the

[1] And so in *trespass*, *Brackett* v. *Hoitt*, 20 N. H. 257; *Tharpe* v. *Stallwood*, 5 M. & G. 760. In *Indebitatus assumpsit*, *Dempsey* v. *McNabb*, 73 Md. 433; *Brown* v. *Lewis*, 9 R. I. 497; *Welchman* v. *Sturgis*, 13 Q. B. 552. And probably in actions for injuries to leasehold property, *Barnett* v. *Guildford*, 11 Exch. 19, 31. But in *detinue*, see *Crossfield* v. *Such*, 8 Exch. 825.

In *Patten* v. *Patten*, Alc. & N. 493, it was held that on ejectment by an administrator the fictitious demise might be laid before grant of letters.

As to the running of the Statute of Limitations, compare *Johnson* v. *Wren*, 3 Stew 172; *Andrews* v. *Hartford & New Haven R. R. Co.*, 34 Conn. 57; *Cary* v. *Stephenson*, 2 Salk. 421; *Pratt* v. *Swaine*, 8 B. & C. 285.

"If an executor, before probate, files a bill, alleging that he has proved the will, such allegation will obviate a demurrer; he must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bears date subsequently to the filing of it. In like manner, a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing. But, although an executor or administrator may, before probate or administration granted, file a bill relating to the property of the deceased, and such bill will not, on that account, be demurrable, provided the granting of probate or of letters of administration be alleged in the bill, yet a defendant may, by plea, take advantage of the fact not being as stated in the bill." — 1 Daniel, Chancery Practice (6th Am. ed.), pp. 318, 319.

plaintiff, leave having been reserved to the defendants to move to enter a nonsuit.

Cur. adv. vult.

The judgment of the court (PARKE, B., GURNEY, B., and ROLFE, B.) was now delivered by

PARKE, B. In this case, which was argued a day or two ago, we delayed giving our judgment, not on account of any doubt we entertained at the time, but in order that we might refer to the several authorities cited at the bar. We are of opinion that the rule to enter a nonsuit must be discharged. The only question is, whether the plaintiff could sue for goods sold and delivered by him as administrator of one Pollard, upon the facts which were in evidence on the trial. It appeared that the goods were sold after the death of the intestate, and before the grant of letters of administration, by one who had been the agent of the deceased on the coast of Africa; and that they were there sold avowedly on account of the estate of the intestate.

It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Tharpe* v. *Stallwood*, 12 Law. J. (N. S.) 241, where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in *Long* v. *Hebb*, Styles 341, is, that otherwise there would be no remedy for the wrong done. The relation being established for the benefit of the intestate's estate, against a wrong doer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party; and cases might be put in which the right to sue on the contract would be more beneficial to the estate than the right to recover the value of the goods themselves. In the present case, there is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator: and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent, the case of *Hull* v. *Pickersgill*, 1 Bro. & B. 282, cited by Mr. Greenwood, being an authority for that position. We are, therefore, of opinion, that the plaintiff is entitled to recover.

Rule discharged.[1]

[1] Compare *Leber* v. *Kauffelt*, 5 Watts & S. 440; *Hatch* v. *Proctor*, 102 Mass. 351.

WARING *v.* DUBERRY OR NEWMAN.

Fortescue 360. 1718.

Goods were taken in execution and the money levied, then administration is taken to the landlord, who died intestate, and the administrator moved the court to have a year's rent.

Per Cur. He comes too late, and fictions in law by relation will not devest an interest vested in a stranger. Stat. 8 Anne, c. 14, page 245; Act of Distress and Sale, 2 W. & M. Sess. 1, *cap.* 5.[1]

ANONYMOUS.

1 Roll. Ab. 917. 1640.

If an executor before probate of the will brings an action of debt on an obligation due to him as executor, but when he declares he shows it to the court approved, it being approved after action brought, yet the action is well brought, because he was executor before probate, although by the law he is not permitted to sue before probate, yet it being proved, the impediment is removed *ab initio*, for he, by showing the will to the court, satisfies the ceremony which the law requires which he has done here as the law requires. *Held* by Berkeley [J.] on a writ of error on such a judgment in the Court of The Marshalsea, where it was so adjudged on a special verdict.[2]

MORGAN, Administrator *v.* THOMAS.

8 Exch. 302. 1853.

Trover for household furniture. Pleas, Not guilty, and not possessed; upon which issues were joined.

[1] s. c. 11 Viner Ab. 133.

[2] "But though he (the executor) may commence an action before probate, yet he cannot indeed go on with the action; for when he comes to declare, he must produce in court the letters testamentary; but now if probate were necessary to make him an executor, he could not bring the action without probate, as is evident in the case of an administrator, in which case there is no right till administration committed; for till then the administrator cannot bring an action; but in the case of an executor, the note proving the will is only an impediment to the action; but the right of action is the same before probate as after; and the reason why an executor cannot go on before probate is for the enforcing of probates, as is said in Hutton, 21, because upon probates there are inventories exhibited and other acts done by the executor, which are for the benefit of the creditors of the testator." — *Per* Powys, J., in *Wankford* v. *Wankford*, 1 Salk. 299, 303.

But the Statute of Limitations begins to run from the appointment of the executor on a claim arising after the death of the testator and before appointment. *Garland* v. *Milling*, 6 Ga. 310. *Arnold* v. *Arnold*, 13 Ired. 171, *contra*.

As to the right of an executor to sue in equity before appointment, see *ante*, p. 443, note.

At the trial, before CROMPTON, J., at the last Carmarthen Assizes, it appeared that the action was brought by the plaintiff, as administrator of his father, Thomas Morgan, for the recovery of the value of certain furniture which had been seized by the defendant as sheriff of the county under a writ of *fi. fa.* The intestate had resided for some years in the town of Carmarthen, and died in September, 1849. His wife and two daughters continued to reside in the house which they had occupied, but the plaintiff lived in a different part of the town. In February, 1851, the furniture of this house, which the widow so occupied, was seized under a writ of *fi. fa.*, upon a judgment obtained against her. The plaintiff served a notice on the defendant not to sell the goods, as being part of the intestate's estate, and not the widow's. The defendant, however, sold the goods, after having taken an indemnity from the execution plaintiff. In the following month of March, the plaintiff took out administration to his father, and subsequently brought this action to recover the value of the goods so seized and sold. Under these circumstances, it was contended, on the part of the defendant, that if the jury should be of opinion that the plaintiff had, after his father's death and before the taking out of administration, assented to the property of the intestate being taken by his mother and the other children, in satisfaction of their shares in the intestate's personal estate under the Statute of Distributions, the defendant was entitled to a verdict. The learned judge left that question to the jury, who found that "the plaintiff had tacitly assented, but that he had done no act." On the part of the plaintiff it was contended, that, although the letters of administration had such a relation as would maintain the action, *Tharpe* v. *Stallwood*, 5 M. & Gr. 760, yet there was no evidence of any assent on the part of the plaintiff as administrator; and if there was such evidence, that, inasmuch as it did not appear that there were no debts due from the estate unpaid, such assent, not being for the benefit of the estate, was of no effect. A verdict was entered for the plaintiff for the sum of £11 2*s.* 9*d.*, with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

POLLOCK, C. B. I am of opinion that this rule ought to be discharged. Unless the conduct of the party whose act is relied upon as binding the estate of the intestate be done by him in the character of administrator, it can have no operation upon the estate, and, accordingly, the utmost effect that can be given to the defendant's argument is, that where a party does an act professedly intending to take out letters of administration, and afterwards becomes administrator, the administration has relation back, and gives effect to what he had done by anticipation. But if that proposition be true in point of law, this case would entirely fail upon the facts, for there was no evidence whatever to warrant the jury in finding that the plaintiff had assented. Upon considering all the facts, there is no evidence bearing out the proposition of an assent, although it is true

that the plaintiff was living at the time in the neighbourhood, and was probably aware of what the parties were doing, and did not choose to interfere; yet it does not follow that he was acting in the character, or even in the assumed character, of administrator. With respect to the legal consideration of the case, the only matter adduced by the defendant's counsel, which is in the least in his favor, is what fell from the Court of King's Bench in *Kenrick* v. *Burges*, Moore, 125, and which turns out to have been a mere *dictum*, although, no doubt, the judges entertained that view of the question. But the modern authorities are opposed to the defendant's arguments, and, amongst other cases, that of *Woolley* v. *Clark*, 5 B. & Ald. 744, may be cited.

PARKE, B. I am of the same opinion; and I do not entertain a doubt upon the question. In the first place, there is no evidence whatever for the jury that the plaintiff ever assented, before he took out letters of administration, to the widow's taking this property as her share of the intestate's goods under the Statute of Distributions; because the principle is, that no consent can be implied against a person who has no power to dissent; and this principle is illustrated by the two legal maxims to which I have already referred. It is only where a man has the power of prohibiting a thing, that his omitting to exercise that power is evidence of his assent. Now at the time the intestate's widow took possession of this property, the plaintiff had no power to prevent her from so doing. He had no interest in the goods, and no power to take them away from her; and therefore, as he had no power to dissent, he did not assent by not interfering in the matter. Even supposing that he had in the most solemn manner, by an instrument under his hand and seal, assented to her doing so, it is perfectly clear from all the modern authorities, which are uniform upon the question, that she would not have thereby acquired a right to claim the property. An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It was not the duty of the plaintiff, acting in the character of administrator, to assent to a legacy till he had seen all the just debts owing by the estate duly satisfied.

ALDERSON, B. There was no evidence to warrant the jury in finding that the plaintiff assented; and that being so, there is nothing to which the relation back can have reference.

MARTIN, B. There is no evidence whatever to entitle the jury to find that the plaintiff has given such an assent as that contended for; and upon this ground alone the rule might be discharged. Upon the other point, the authorities are also clear. With regard to the objection, that inconvenience might arise if a person were to be deprived

of property of which he had been in possession for many years, say for twenty years, by administration being taken out, it seems to me that it might fairly be left to the jury to say, whether such property had not come into the possession of the party by gift or by will.

Rule discharged.

ALVORD *v.* MARSH AND ANOTHER.

12 Allen 603. 1866.

CONTRACT brought by the administratrix of the estate of Justus B. Alvord, against the administrators of the estate of Robert G. Marsh, to recover $100 for work done by Alvord for Marsh. The bill of particulars annexed to the writ consisted of a charge for "work and labor each month in 1860, 1861, $300." The defendants admitted that Alvord performed work for Marsh, but professed their ignorance of the amount and value of his services; averred that Marsh and the plaintiff had a settlement, and that he paid her the balance found due on accounting together; and also filed a declaration in set-off, with an account of about two hundred items, amounting together to $788.95.

The case was submitted to the determination of the Superior Court upon the pleadings, and the report of W. B. C. Pearsons, who made an award as referee under rule of court. The following is an exact copy of the whole of this award, with the exception of the merely formal parts:

"It appeared in evidence that plaintiff's intestate died June 5th 1861, and letters of administration were issued to plaintiff Nov. 5, 1861. The defendant relied upon a set-off, embracing items of account between June 5th, 1861, and Sept. 1st, 1861, of goods sold, $11.53; labor of man, $9.00; funeral expenses, $15.87; cash $6.05; and rent of tenement for June, July, and August, 1861, $11.00, furnished to the plaintiff. It was not proved that these items were furnished in pursuance of any contract with the intestate. The plaintiff objected to the allowance of any of these items, as having been made between the death of plaintiff's intestate and the issuing of letters of administration.

"The defendant also relied upon a receipt duly proved, of which the following is a copy: 'Holyoke, Aug. 30, 1861. Received of R. G. Marsh twenty dollars in full of all demands on account of the estate of Justus B. Alvord, late of Holyoke, deceased, also in full of house rent, and all other bills against myself to Aug. 1st, 1861. (Signed) Nancy A. Alvord. Attest: W. A. Judd.' The amount actually paid upon this receipt was $17.00, and it did not pay the full balance, as appeared upon a careful computation of the books, by the amount of $1.20.

"I therefore allow in defendant's set-off the items of goods sold, $11.53; funeral expenses, $15.87; cash, $6.05; and disallow for

labor of man, $9.00, and rent of tenement in July and August, $7.00. I also allow the plaintiff $1.20, as appears by the correct computation of the books, and adjudge that the plaintiff recover of the defendant the sum of seventeen dollars and twenty cents, as damages and costs taxed at. The costs to be agreed by the counsel for parties, except referee's costs."

Judgment was thereupon rendered for the defendant, and the plaintiff appealed to this court.

HOAR, J. The taking out letters of administration relates to the death of the intestate, and by operation of law makes valid all acts of the administrator in settlement of the estate from the time of the death. It therefore legalizes receipts of property by the administrator for which he would otherwise have been responsible as executor *de son tort;* and requires him to account for them in regular course of administration. *Shillaber* v. *Wyman,* 15 Mass. 232; *Andrew* v. *Gallison,* Ib. 325, n.; *Priest* v. *Watkins,* 2 Hill (N. Y.), 225. It has indeed been doubted whether an executor *de son tort* can give any title to the goods of the intestate as against the rightful administrator, especially where the conveyance is the single wrongful act which makes him executor *de son tort. Mountford* v. *Gibson,* 4 East, 441; *Pickering* v. *Coleman,* 12 N. H. 148. But no such question can arise where, as in the present case, the alleged executrix *de son tort* becomes herself afterward the lawful administratrix. Her acts of receiving debts due to the estate, or property belonging to it, become by relation lawful acts of administration, for which she is liable to account, to the same extent as if they had occurred after the letters of administration were granted. The liability thus imposed upon her necessarily involves a validity in her acts which is a protection to those who have dealt with her concerning the estate. The plaintiff, therefore, if she has undertaken to receive a debt due to the estate which she represents before her appointment as administratrix, and has given a discharge or acquittance therefor which would have been valid if she had then been duly appointed, has made herself chargeable with the whole amount of the debt; her subsequent appointment gave complete validity to the transaction; and she cannot maintain her action.

It then remains to determine whether, upon the facts agreed, the defendant paid or satisfied the debt due from him to the intestate. The claim annexed to the plaintiff's writ is for work and labor, $300. The defendant has filed a declaration in set-off amounting to $788.95, and embracing a very large number and variety of charges. Among them were some claims against the administratrix personally, for money and rent due from her after the death of her intestate. She gave to the defendant a receipt in full of all demands on account of the estate, including a settlement of these personal liabilities, on the payment by him of $17. The facts show that, upon a careful computation of all amounts proved on each side, this sum was not

sufficient by the amount of $1.20. But we can have no doubt that an administratrix, who is herself indebted to a debtor of the estate, may, if she chooses, accept a discharge of her own debt toward the payment of the debt due to her as administratrix. By so doing she makes herself answerable to the estate for the whole debt which she thus settles and discharges. And while it is clearly settled that the receipt of a less sum is no valid discharge of a larger amount which is due, yet this applies only to the case of an ascertained and undisputed debt. The rule has no application to the case of an accounting together between two parties having various and unliquidated demands against each other. As the plaintiff's demand was for labor, of which both the time and the price were to be proved or agreed; as the defendant had an account of a much larger amount; as questions of interest might very likely arise; and as the sum fixed by the parties, without fraud or concealment of facts, was within such a trifling amount of the sum appearing to be due upon a new and "careful computation of the books"; the case comes precisely within the authority of *Donohue* v. *Woodbury*, 6 Cush. 148. The settlement between the plaintiff and defendant was in the nature of an *insimul computassent;* and the receipt in full was a bar to the action.

Judgment for the defendants.[1]

BRAZIER *v.* HUDSON.

8 Sim. 67. 1836.

A TERM for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death letters of administration, limited as to the term, were taken out to Hodgson.

On the hearing of an exception to the Master's report as to the title to the estate, one question was whether the administrator was the proper person to assign the term to a trustee for the purchaser.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] Lord Holt, in his judgment in *Wankford* v. *Wankford*, 1 Salk. 299, says that an act done by an executor is valid, provided the will is ultimately proved,

[1] *McDearmon* v. *Maxfield*, 38 Ark. 631; *Moore* v. *Wright*, 4 Ill. App. 443; *McClure* v. *People*, 19 Ill. App. 105; *Vroom* v. *Van Horne*, 10 Paige 549; *Whitehall* v. *Squire*, 1 Salk. 295, *accord. Wilson* v. *Hudson*, 4 Harr. 168; *Gilkey* v. *Hamilton*, 22 Mich. 283; *Haselden* v. *Whitesides*, 2 Strob. 353; *Bradbury* v. *Reynal*, Croke Eliz. 565 (*semble*); *Laury* v. *Alfred*, 2 Brownl. & G. 183; *Morgan* v. *Thomas*, 8 Exch. 302; *Doe d. Hornby* v. *Glenn*, 1 A. & E. 49, *contra.*

Compare *Shillaber* v. *Wyman*, 15 Mass. 322; *Andrew* v. *Gallison*, 15 Mass. 325; *Mayner* v. *Ryan*, 19 Mo. 196; *Rattoon* v. *Overacker*, 8 Johns. 126; *Priest* v. *Watkins*, 2 Hill (N. Y.) 225; *Matter of Faulkner*, 7 Hill (N. Y.) 181; *Outlaw* v. *Farmer*, 71 N. C. 31; *Casto* v. *Murray*, 47 Oreg. 57; *Cook* v. *Cook*, 24 S. C. 204; *Middleton's Case*, 5 Co. 28 b; *Williamson* v. *Norwich*, Style 337; *Baker* v. *Beresford*, 1 Keble 285; *Vaughan* v. *Browne*, 2 Str. 1106.

although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate had been taken, should be considered as valid if the will is ever afterwards proved. The consequence is that upon letters of administration to Hodgson, with his will annexed, being taken out, the assignment to Baxter will be established.

Exception allowed.[1]

MONROE, EXECUTOR *v.* JAMES.

4 Munf. 194. 1814.

IN this case (which was an action of detinue in behalf of the appellant against the appellee), the following case was agreed by the parties; viz. that the negro woman slave in the declaration mentioned, was the property of Joseph Jones, senior, deceased, at the time of his decease, and subject to the disposition of his last will and testament, set forth *in hæc verba;* the executors appointed therein being James Monroe, Joseph Jones, the testator's son, and others; that the defendant bought her, for valuable consideration, from one George Legg, who bought from Joseph Jones, jun., deceased (*named* one of the executors in said will), for valuable consideration, after the said Joseph Jones, jun., had attained the age of twenty-one years, and after the said will was duly proved and recorded; he, the said Joseph Jones, jun., now deceased, not having then, or after, qualified as executor under said will; that no other person had qualified as executor of said Joseph Jones, sen., or taken out letters of administration on his estate, at the time of the sale of the said negro woman by Joseph Jones, jun.; that the plaintiff is the only regularly qualified executor of said Joseph Jones, sen., deceased; that the negro slave in the declaration mentioned, is in the defendant's possession, and was so at the time of institution of the suit; and that demand of her was duly made before said institution.

The following clause in the will related to the subject of the present controversy: "I give and devise unto my son Joseph Jones, and his heirs and assigns, all my estate real and personal. In case he shall die before he arrives to lawful age, or, being of lawful age, shall die without a child or children to inherit the estate hereby given to him, it is my will that the same shall, after his death, be divided between the children of my late sisters Esther Tyler and Elizabeth Monroe now living, allowing my nephew Colonel James Monroe the first choice."

A verdict was found for the plaintiff, subject to the court's opinion upon the case agreed. The court entered judgment for the defendant; whereupon the plaintiff appealed.

[1] *Johnson* v. *Warwick*, 17 C. B. 516, *accord*.

Friday, February 11th, 1814, the judges (COALTER, CABELL, and FLEMING) delivered their opinions, *seriatim*.

JUDGE COALTER. In England an executor, before probate, may do almost everything which he can do afterwards. He may take possession of the goods, pay and receive debts, make acquittances and releases of debts, take releases, sell, or give away the goods, assent to legacies, &c.; and these things do not require a subsequent probate to confirm them; for, if he die *after* any of these acts done, and before probate, yet they stand good. He may sue and be sued, but cannot declare until probate: — he may file a bill, and it will be good if he takes probate before trial. These are the only acts which I can discover, which require a probate to enable him as effectually to do, as though the probate had been taken. Nay, where A., B., and C. are executors, and A. refuses, and B. and C. take probate, there A. continueth executor, notwithstanding his refusal (the will being proved in the names of all), so as he still may release debts due to the testator, and B. & C. cannot maintain suit in their names alone, but must join A. also: — the probate in fact inures to him, and he may administer thereafter at his pleasure, and intermeddle with the goods, as well as the others; and if he survives, he will proceed with the administration, as I understand.

The reason of all which is, that there an executor may undertake the trust reposed in him, as well by acts *in pays*, signifying his consent to do so, as by taking probate before the ordinary; and every act of administration or intermeddling with the estate, even in a slight degree, makes him executor, and he *cannot afterwards* refuse, but must proceed to execute the will: — he can be sued as executor, and if he pleads that he neither is executor, nor ever did administer as executor (which is the common plea to free himself in such case), it will be found against him, on such intermeddling being proved. The goods of the testator are considered his property from the death of the testator; and before probate he may maintain trespass, replevin or detinue, for goods taken or trespass done, after the death of the testator; for these actions arise on his own possession.

There, too, the probate, as well as the *refusal*, have relation to *the death of the testator*. As where administration had been committed before any will proved or notified to the ordinary, and the administrator sold some of the goods, the executor brought detinue for these goods, and recovered them.

And a *refusal* shall have a like relation, so that the administrator may have an action of trespass for goods taken before administration committed.

In this country, the executor is to take an oath, and give bond and security, in every case except where by the will it is dispensed with, and there too, if the court think proper to require it. Whereas, in England, he gave no bond, except where a court of chancery, to prevent fraud, should interpose and require bond, or where the testator,

by his will, made an executor conditionally, that he put in security, and *then* be executor.

The Statute of 10 Ann. *ch.* 2, § 12, was the first law requiring security in this State; and that did not require it generally, but only in such cases where the court should have reason to suspect that an executor might act fraudulently; and which provides that such a failure to give security should be construed a refusal to act as executor, and that administration *cum testamento annexo* might, thereupon, be granted. This Statute has a proviso substantially the same with that of 22 Geo. 2, *ch.* 5, hereafter mentioned, as to the power of the executor before probate, or administration, as aforesaid.

This latter Statute requires bond and security to be given generally, as first above stated; and in the 21st section is the following proviso: "that nothing herein contained shall be construed to abridge or restrain the power of executors over their testator's estates, until probate of the will, *or administration with the will annexed*, be obtained or granted; but they may *possess* themselves thereof, and till then *execute their trust*, as fully and amply as if this Act had never been made."

This Act also provides that a failure to give security shall amount to a refusal of the executor to act.

The question is, what effect this Act, together with the exception, or proviso, had on sales made by the executor thus required to give bond, and who, in fact, never did give such bond; the Act of 1785 simply continuing the power of executors before probate, as heretofore.

Under the first Statute above mentioned, where the court, *suspecting fraud*, required security, could it have been intended that the executor, notwithstanding such requisition, might sell, give away, and waste the whole estate, and in fact commit the very fraud intended to be guarded against; so that there would be a dry and naked administration only to be granted? Suppose bond to be required in England by a court of chancery, would a sale, after the decree, be good, the executor never giving bond? Must not the purchaser notice this decree, and buy at his peril? But here, security is required by law, which is notice to all the world. If there are two or more executors in this country, and one refuses to give bond, and the other takes probate, can the refusing executor, who never gives bond, sell and dispose of the estate, as in England he may do?

It appears to me that the proviso must either destroy the great objects of the law, or be itself declared void as contravening those great objects; or such a construction must be given that both can, with reason and propriety, stand.

The Statute in this country most materially innovates on the common law doctrines above noticed, in one great and important point, a proper consideration of which, I think, will aid much in guiding us in this inquiry.

By those doctrines, an executor once intermeddling with, or administering, in the smallest degree, the assets, takes upon him the executorship, and he can never afterwards refuse. Here the very clause requiring bond, and the proviso under consideration, suppose an intermeddling by the executor before bond given, by the terms of which he is to account for the assets that *have* or *may* come to his possession; yet the refusal to give that bond shall here be a refusal of the executorship, and administration may be granted; but refusal, as well as probate, relates to the death of the testator, who, on such refusal, is supposed to die intestate, as to the appointment of executors, and therefore the person named as such stands as having never been executor. I suppose it is for this reason, probably, that a refusing executor does not join in a suit, and is not sued, in this country. From this it would seem to result, that a qualification, and giving bond, are annexed, in all cases, *by law* (as it may in England, by the will itself), as conditions preceding the full right of the executor finally to act; and that, consequently, a probate, according to our law, will be necessary to confirm *mesne* sales, &c., made before such probate.

By the proviso, he may *possess* himself of the goods, and proceed to *execute* the *trust*. How? By wasting and giving away the goods? Surely not: — such acts would not be in execution, but in fraud of the trust. Our law does not direct a sale even of perishable goods, until after probate; and such is the multiplicity of courts, and the facility with which that may be obtained, that a sale or alienation of the effects can seldom be necessary in this country before probate. But if it should be necessary (as in some cases it may), it must be by one who is executor, that is, who shall give bond; for if he does not, he shall be considered as no executor: he cannot both be executor and no executor: he cannot both accept and refuse; and the person purchasing must trust to this subsequent act of confirmation. It is better it should be so than that the proviso should counteract the whole law.

The executor may do many things in the *execution of his trust*, before probate, which, though they would have been sufficient to make him executor in England, shall not here, if he refuse to give bond. He may see to burying the deceased, take possession of the goods, take care of them until probate or administration granted; may sue to prevent the Statute of Limitation from running; may be sued, for the same reason, &c. But if he proceeds actually to administer the estate, he must at least confirm those acts by probate and giving bond; for, until that is done, he may refuse the trust, and is no executor; and by that alone he elects to be executor.

This is the only way in which I can reconcile the Act to itself, and to the principles of the common law above mentioned. Either the proviso must defeat the law, or be itself defeated, or they must both receive such construction as that they may stand together. The law was intended to prevent frauds and embezzlement, and therefore

ought to be construed liberally, so as to advance the remedy, and prevent the mischief. I can perceive little injury accruing, either way, under the construction now put; and if the powers of executors before probate are narrowed by it, and if estates may be injured through defect of power in the executor, it will but rarely happen; whereas, if their powers should be as large as is contended for, the evils would be incalculable.

On the whole, I think the law, on the case agreed, is for the appellant; and that, therefore, the judgment of the superior court of law is erroneous, and must be reversed, and judgment entered for the appellant.

JUDGE CABELL. The question presented by the case agreed is, whether a sale, for valuable consideration, of a slave belonging to the estate of a testator, by a person named as executor, but who never qualified by giving bond and security, is good against the executor who did qualify.

Were this case to be decided by common law principles, without regard to our Act of Assembly, it would not admit of doubt. An executor derives his power from the will; and, at common law, nothing was required to invest him with the full exercise of that power, for almost every possible purpose, but his acceptance of the trust. By any intermeddling with the estate, which amounts to a partial administration, he is considered as having accepted the trust, and taken upon himself the whole administration; and he becomes thereby, *ipso facto*, complete executor: and it is on this ground, and on this only, that, although he may die before probate of the will, yet the acts done by him will be valid.

These principles of the common law must be applied to, and must govern this case, except so far as they may have been changed by our Acts of Assembly. It is impossible to read our Statutes upon this subject, without being struck by one most important change. To the confidence reposed in the executor by the testator, there is superadded the necessity of giving bond and security for the faithful discharge of the duties of the office. The refusal or failure to give security is expressly declared to amount to a refusal of the executorship; and the court shall, thereupon, grant letters of administration, with the will annexed, to the person to whom administration would have been granted if there had been no will. In this country, therefore, he is not, as in England, complete executor by a mere partial administration of the estate. To make him complete executor, it is indispensably necessary that he shall qualify by giving bond and security. The only principle, then, which at common law gave validity to the acts of an executor who died before probate, is done away by this Statute: and, if there had been no further provision in the law, I presume the opinion would have been universal, that the acts of an executor who never qualified would not be valid against one who had qualified. But it is contended, that the twenty-second

section which declares, that "the power of executors over their testators' estates before probate of the will is not hereby restrained, but shall continue as heretofore," is so express and positive, that it will be impossible to invalidate any acts of the executor, however ruinous to the estate, and even although he should afterwards refuse or fail to give security. The certain consequence of this construction would be to defeat the great object of the Legislature, the protection of the rights of creditors and of legatees; for any executor, so disposed, might waste the whole of the estate before the court could arrest his progress by granting letters of administration. Such inconsistency cannot be attributed to the Legislature. A just construction will give harmony to all parts of this important Statute. The interest of the estate will, almost always, require many acts to be done before an executor can qualify. Without defining any particular cases, the law therefore has wisely provided that the power of an executor before probate shall remain unrestrained. The confidence reposed in him by the testator, his acceptance of the trust, and the necessity of the case, require that he have power to do whatever he might have done at common law. As he *may* become complete executor, by giving bond and security, and as he *ought* to do so after having intermeddled with the estate, the law so far regards him as executor, as to consider his acts valid for the present; and they will become irrevocably so, provided he shall perfect his character as executor, by a subsequent qualification. But, if he refuses or fails thus to qualify, he is considered as having altogether refused the executorship; and this refusal relates to the death of the testator. As to him, the will is considered as having never been made; and, thus, the only foundation of his authority being done away, all his acts are invalidated.[1]

[1] The concurring opinion of JUDGE FLEMING is omitted.

Carter v. *Carter*, 10 B. Mon. 327; *Gay* v. *Minot*, 3 Cush. 352; *Stagg* v. *Green*, 47 Mo. 500, *accord*. See *Wall* v. *Bissell*, 125 U. S. 382; *Gardner* v. *Gantt*, 19 Ala. 666. *Thiefes* v. *Mason*, 55 N. J. Eq. 456; *Magwood* v. *Legge*, Harp. 116, *contra*. See *Hogan* v. *Wyman*, 2 Oreg. 302; *Shoenberger* v. *Lancaster Savings Institution*, 28 Pa. 459.

But, if the executor is subsequently appointed, his letters relate back to legalize in certain cases his previous acts. *Pinkham* v. *Grant*, 78 Me. 158; *Wilson* v. *Wilson*, 54 Mo. 213; *People* v. *Barker*, 150 N. Y. 52.

CHAPTER VI.

WHAT INTERESTS PASS TO THE EXECUTOR OR ADMINISTRATOR.

At common law title to real property passed to the heir in the case of an intestacy, to the devisee in case of a will. The personal representative had no interest therein. Nor was realty liable for debts, other than specialty debts in which the heir was named, unless charged with them in the will, or devised in trust to pay them. In England by the Land Transfer Act, Stat. 60 & 61 Vict. c. 65, Part I, § 1 (1897), title to real estate vests in the personal representative as if it were a chattel real. In the United States by statute realty is liable for debts irrespective of the disposition by the decedent. In some states the executor or administrator has a mere power to sell under order of the court realty for payment of debts and no further interest therein. In others he has possession and control during the term of administration. Here the common law rule is almost wholly abrogated. In others title vests in the heir or devisee; and he can assert the common law incidents of title until the personal representative asserts his possessory right, which arises when necessary for the benefit of creditors. The statutes and other authorities on the relation of the executor or administrator to the real property of the deceased are collected in 2 Woerner, Am. Law of Adm. (2d ed.), §§ 337, 338.

At common law if a tenant for life assigned his estate to another and the latter died in the life of the grantor, any one who entered on the land might hold for the life of the grantor. But if the grant were to another and his heirs, or the heirs of his body, the person who came within the designation held the land as special occupant after the death of the grantee. By Stat. 29 Car. II, c. 3, § 12 (1677) and Stat. 14 Geo. II, c. 20, § 9 (1740) the owner of the estate *per auter vie* might devise it by will, but if no such devise were made, and there were no special occupant, it must be distributed as part of the personal estate of the grantee. Williams, Real Property (22d ed.), pp. 131–133. In the United States by statute the estate *per auter vie* is generally liable for the debts of the tenant. The statutes, however, differ as to whether subject to debts it passes to the heir or to the administrator. In some states it is devisable. 1 Washburn, Real Property (6th ed.), § 235; 1 Stimson, Am. Stat. Law, § 1335.

DOE d. SHORE *v.* PORTER.

3 T. R. 13. 1789.

THIS was an action of ejectment for a messuage, cottage, and half an acre of land, brought upon the demise of John Shore, administrator of the effects and credits of William Shore, deceased; which demise was laid in the declaration to commence from the first of March, in the 27th year of the reign, &c., to have and to hold the said premises for seven years, &c. To this the defendant pleaded not guilty; and at the trial, lease, entry, and ouster being confessed, the plaintiff produced one William Shore as a witness, who gave evidence as follows: "The premises did belong to me. I granted a lease to the defendant; William Shore was undertenant to him; he paid me the rent reserved by Porter's lease two or

three times; he paid to Lady-day, 1786. William Shore died the 31st of October, 1786. Porter accepted the deceased as his tenant on my recommendation. Porter paid me rent while the deceased was in possession, and told me I need not take the trouble of coming over to him, but receive the rent of the deceased. The deceased came in in the summer of 1780; my rent was due every Lady-day." The plaintiff also proved the letters of administration duly taken out. To this evidence the defendant demurred, and the plaintiff joined in demurrer.

LORD KENYON, C. J. The lessor of the plaintiff, who is the administrator of William Shore, claims as tenant from year to year the property which is the subject of this ejectment. And the first question is, What title is proved to have been in William Shore at the time of his decease, by the evidence stated on this record? And I think that the only inference to be drawn from it is, that he had that interest which his administrator says he had, namely, a tenancy from year to year so long as both parties pleased. As between the original parties, as long as both of them lived, he could not have been dispossessed without six months notice ending at the expiration of a year. But it is argued that though this was the interest which William Shore had, a different interest devolved on his personal representative. On this question I do not know how to state a doubt; for this was a chattel interest from year to year as long as both parties pleased; and it seems clear to me, that whatever chattel the intestate had must vest in his administrator as his legal representative. Then it is supposed that some inconveniences may result from such a determination: but I see none; and many inconveniences might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months previous notice. And all the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavored to provide by raising the implied contract, exist equally in the case of their personal representatives. Then is there any objection in point of form against the plaintiff's recovering in this ejectment? The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment; the whole of which is an absolute fiction. And this fiction does not even affect the case of an action for the mesne profits. The case cited from Levinz [*Roe* v. *Williamson*, 2 Lev. 140; 3 Keb. 490] is entitled to greater consideration than that in Keble, who was a bad reporter; and according to the former report the question was adjourned; and Twisden, J., who was a very able lawyer, was of a different opinion from the two other judges; besides, this kind of proceedings were not then so well understood as they are at this time. And the doctrine

in Keble has been entirely exploded of late years. Therefore I am of opinion that there is no ground for either of the objections.

Ashhurst, Buller, and Grose, J. J., concurring.

Judgment for the plaintiff.[1]

McLEAN, Administrator *v.* WEEKS.

61 Me. 277. 1873.

Appleton, C. J.[2] This is an action of assumpsit, brought by the administrator of the estate of William Woodman, to recover the sum of seven hundred dollars, given by said Woodman to the defendant a few days before his decease. The plaintiff offered to prove the insolvency of Woodman at the date of the gift, and that the estate was rendered insolvent and was so insolvent.

The presiding justice ruled upon the facts offered to be proved that the action was not maintainable.

The gift, as between the parties thereto and the heirs of the donor, was valid. So far as the rights of prior existing creditors are concerned it was fraudulent, or evidence from which the inference of fraud must be drawn.

The estate being insolvent, the creditors defrauded cannot institute suits against the donee for the recovery of the money given. The administrator must act for them. He is trustee. It is his duty to protect and enforce their rights. As to them the gift is void, and the money given should be in the hands of the administrator, as a part of the assets of the estate for the payment of its debts.

Assumpsit for money had and received is an equitable action. The gift being void, so far as the plaintiff acts for the creditors, he can recover on the money counts the amount in the defendant's hands, to be appropriated with the other property of his intestate, for the payment of the creditors entitled thereto and the necessary expenses of administration. The balance, if any, will belong to the defendant. Though the gift may be void as to creditors, it is valid as against the heirs of the giver. *Abbott* v. *Tenney*, 18 N. H. 110. It is for the administrator to show the amount required to pay the debts due from the estate to its several creditors, defrauded by his intestate, for that is all which he is entitled to recover. The remainder, if any there be, belongs to the defendant.

The motion to dismiss cannot avail the defendant. It is not entitled in this suit. It will apply as well to any other cause on the docket as to this. It is not stated in the bill of exceptions that the oath was administered by the plaintiff's attorney, and if it had been, it is not readily perceived why he was not as competent to administer it as any other magistrate.

Exceptions sustained.

[1] An *interesse termini* passes to the personal representative. Co. Lit. 46 b.

[2] The statement of facts and the dissenting opinion of Tapley, J., are omitted.

KENT, J., concurred; and DICKERSON, BARROWS, and DANFORTH, JJ., concurred in the result.[1]

Stat. 13 Edw. I., c. 23 (1285). Executors from henceforth shall have a writ of accompt, and the same action and process in the same writ as the testator might have had if he had lived.[2]

HOVEY, ADMINISTRATOR *v.* PAGE.

55 Me. 142. 1867.

DANFORTH, J.[3] — This action was commenced by the plaintiff's intestate in her lifetime, and is for an alleged breach of promise of

[1] If the estate of the deceased is insolvent, the personal representative may sue for the benefit of creditors for property which has been conveyed by the deceased in fraud of them. *Forde* v. *Exempt Fire Co.*, 50 Cal. 299 (statute); *Freeman* v. *Burnham*, 36 Conn. 469; *Bassett* v. *McKenna*, 52 Conn. 437; *Martin* v. *Bolton*, 75 Ind. 295; *Judson* v. *Connolly*, 4 La. Ann. 169. And see *Delaneuville* v. *Duhé*, 114 La. Ann. 62 (see *Van Winkle* v. *Calvin*, 23 La. Ann. 205); *Bank of Berwick* v. *Vinson Shingle & Mfg. Co.*, 124 La. Ann. 1000; *Cross* v. *Brown*, 51 N. H. 486; *Preston* v. *Cutler*, 64 N. H. 461; *McKnight* v. *Morgan*, 2 Barb. 171; *Doney* v. *Clark*, 55 Ohio St. 294; *Stewart* v. *Kearney*, 6 Watts 453; *Pringell* v. *Pringell*, 59 Pa. 281; *Burges* v. *New York Life Insurance Co.*, 53 S. W. Rep. (Tex.) 602 (but compare *Hunt* v. *Butterworth*, 21 Tex. 133, 141); *Ecklor* v. *Wolcott*, 115 Wis. 19 (statute). Compare Idaho, Rev. Codes (1908), § 5558; Massachusetts, Rev. Laws (1902), c. 146, § 17; Nebraska, Rev. Stats. (1913) § 1375; North Carolina, Rev. Laws (1908), § 50; Vermont, Pub. Stats. (1906) §§ 2861–2866.

In the following cases it was held that the personal representative could not sue if the estate was solvent. *Field* v. *Andrada*, 106 Cal. 107 ((statute); *Jarrell* v. *Brubaker*, 150 Ind. 260 (statute); *Dorsey* v. *Smithson*, 6 Har. & J. 63; *Schwalber* v. *Ehman*, 62 N. J. Eq. 314; *McCall* v. *Pixley*, 48 Ohio St. 379 (statute); *Pitt* v. *Poole*, 91 Tenn. 70 (statute). Compare statutes in preceding paragraph.

In the following cases the personal representative, even though the estate was insolvent, was not allowed to sue for the benefit of creditors for the recovery of property conveyed by the deceased in fraud of them. *Marler* v. *Marler*, 6 Ala. 367; *Holliday* v. *McKinne*, 22 Fla. 153; *Choteau* v. *Jones*, 11 Ill., 300; *George* v. *Williams*, 26 Mo. 190; *Estes* v. *Howland*, 15 R. I. 127.

In the following cases the court denied broadly the right of the personal representative to sue on behalf of creditors. It did not appear whether or not the estate was solvent. *Eubanks* v. *Dobbs*, 4 Ark. 173; *Beale* v. *Hall*, 22 Ga. 431; *Chandler* v. *Phillips*, 8 B. Mon. 81; *Anderson* v. *Bekner*, 1 Hill Law 246; *Thomas* v. *Soper*, 5 Munf. 28; *Backhouse* v. *Jett*, 1 Brock. (U. S.) 500. But compare *Bethel* v. *Stanhope*, Cro. Eliz. 810.

A creditor of the deceased may proceed directly against the grantee under the fraudulent conveyance. *Werborn* v. *Kahn*, 93 Ala. 201; *Hills* v. *Sherwood*, 48 Cal. 386; *White* v. *Russell*, 79 Ill. 155; *Bottorff* v. *Covert*, 90 Ind. 508; *Francis Mill Co.* v. *Sugg*, 169 Mo. 130; *Sheppard* v. *Green*, 48 S. C. 165; *Spencer* v. *Armstrong*, 12 Heisk. 707; *Armstrong* v. *Croft*, 3 Lea 191; *Allen* v. *McRae*, 91 Wis. 226. Compare *Chamberlayne and others* v. *Temple*, 2 Rand. 384, *ante*, p. 408. But, if the administrator can sue, it has been held that a creditor has no remedy. *Putney* v. *Fletcher*, 148 Mass. 247.

[2] Rights of executors to "have actions of debts, accompts, and of goods carried away," were extended by Stat. 25 Edw. III, Stat. 5, c. 5 (1350) to executors of executors; and rights "to demand and recover as executors the debts due" to the intestate were given by Stat. 31 Edw. III, Stat. 1, c. 11 (1357) to administrators.

[3] The statement of facts is omitted.

marriage. That such an action does not survive at common law, without an allegation of special damage, is well settled. *Stebbins* v. *Palmer*, 1 Pick., 70; *Smith* v. *Sherman*, 4 Cush., 408. Nor does it come within the provisions of R. S., c. 87, § 8. In this case, no special damage is alleged, but there is an offer to prove, for which the same effect is claimed, "that, after such alleged promise, the deceased had a child born to her out of wedlock, now living, and that the defendant is the father of the child." It is not necessary now to decide whether such testimony, with or without an amendment of the declaration, would be admissible; for we are of the opinion that, if the facts stated in the offer were proved, there would not be such special damage as to authorize the prosecution of the suit. In order to do so, it must be such as to affect the proprety and not such as is purely personal. The distinction between actions which do not survive, and those which do, is, that the former are to recover damages to the person only and the latter damages to the property. If any others survive it is by virtue of statutory provisions. Hence, the allegations of special damage which would cause the action to survive, must be of damage to the property, and such as would be sufficient of itself to sustain a suit.

That such was the understanding of the Court in *Stebbins* v. *Palmer* is evident from the last sentence in the opinion, by which it is left in doubt whether, in case the action survives, the plaintiff would recover any more than the damage to the property. In *Smith* v. *Sherman*, it is held, "that it must be some damage of such a character, that it might be given in evidence, to aggravate the damage in one action, or be itself the substantive cause of action, as in trespass *quare clausum*, and conveying away the plaintiff's goods." As a matter of principle, it is evident that the effect of proof offered for the purpose of aggravating the damage, or to sustain special damage, could not be greater than if offered in a separate action, for that which is merely incidental to the principal thing must fall when the principal falls, — and that which would not of itself sustain an action would not cause one to survive which would otherwise abate. Now the testimony offered and relied upon in this case, if admissible, would increase the damages only on the ground of injury to the character and not to the estate; nor would it of itself sustain an action, for, if seduction is relied upon, the plaintiff's intestate, if living, would have no legal cause of complaint. *Paul* v. *Frazer*, 3 Mass., 71. If the expense of supporting the child is relied upon, the only remedy is that provided by statute. 2 Kent's Com., 215.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and TAPLEY, JJ., concurred.

Plaintiff nonsuit.[1]

[1] *Chamberlain* v. *Williamson*, 2 M. & S. 408, *accord*. Compare *Kennedy* v. *Rogan*, 156 Pac. (Mont.) 1078.

HAMILTON AND OTHERS *v.* WILSON.

4 Johns. 72. 1809.

THIS was an action of covenant brought by the plaintiffs, as heirs at law of James Hamilton, deceased, against the defendants. The declaration set forth a deed for certain lands in the military tract, made and executed by the defendant to James Hamilton, in his life-time, bearing date the 7th September, 1791. The deed was in the usual form, containing the covenant of seisin, &c. The plaintiffs alleged that the defendant, at the time of the delivery of the deed, was not seised, &c., and that he had not kept his covenant, &c. Plea, the general issue.

A motion was now made in arrest of judgment, because the covenant of seisin, in which the breach is assigned was broken, if at all, as soon as it was made, and did not descend with the land to the plaintiffs, and that no action can be maintained by the heirs of the grantee, but the action must be brought by his personal representatives. (2 *Johns. Rep.* 1. *Greenby v. Kellogg & Willcocks.*)

The case was submitted to the court without argument.

VAN NESS, J. delivered the opinion of the court. The breach assigned in this declaration is, that the defendant was not seised. The covenant, therefore, was broken, the moment the deed was executed; and the ancestor had a perfect right of action for damages in his life-time. The question then is, whether, upon his death, this right of action descended to his heirs, or to his personal representatives?

The covenant here was not connected with the estate, because, as no estate passed by the deed to the ancestor, none descended to his heirs. Real covenants, such as run with the land only, go to the heir. The right of the ancestor was a mere right of action for a breach of the covenant in his life-time, which, upon his death, belonged exclusively to his personal representatives, and the damages recovered in such cases are assets in their hands. This is so laid down by Justice Doderidge (Off. of Ex. 65). He says, "as to covenants touching inheritances, viz. the assurance of lands, or enjoying thereof, free of incumbrances, or the like, if the covenant be broken in the testator's life-time, I think clearly the action has accrued to the executor, for that his testator was to recover damages in the action of covenant for that breach, and being entitled to these damages as principal, and not any accessary thing in that action, the law hath cast that action upon the executor." Baron Comyns and Buller lay down the same rule for law (Com. Dig. tit. Adm'r, B. 13. Bull. N. P. 158). The case of *Lucy* v. *Levington* (1 Vent. 175, 176, s.c. 2 Lev. 26) is a leading authority on this question. That was an action by the executor upon a covenant for quiet enjoyment, made with the covenantee, his heirs and assigns, and the breach assigned

was, that the plaintiff's testator was evicted in his life-time. Ventris says, "it was agreed by all the justices, that though the covenant was made only to I.S. his heirs and assigns, and though it was an estate of *inheritance;* yet, the breach being *in the life-time of the testator,* the executor had well brought the action for the damages." Levinz, however, gives the decision of the court, and the reasons upon which it was founded, more at large. "It was resolved by the court, that the eviction being to the testator, *he cannot have an heir or assignee* of this land; and so the damages belong to the executors, though not named in the covenants, for they represent the person of the testator." That the true reason is here given why the damages belonged to the executors is evident from this consideration; the testator having been evicted in his life-time, on account of the failure of the title which he derived from the deed, there was no land at his death, to which the covenant could attach, and, therefore, the covenant could not descend to the heir. It is, perhaps, difficult to reconcile this principle with the precedent which is to be found in Coke's Entries, 111. That appears to have been a suit by Barker, the son and heir, &c. against Wiseman, upon the covenant of seisin, by the defendant to the plaintiff's ancestor, his heirs and assigns. The plaintiff had judgment, but it does not appear that the question whether the heir could maintain the suit, was raised. The eviction is stated to have been of the heir, after the death of the ancestor, who entered in his life-time, and died seised, and the breach is alleged to have been to the heir, and that was the ground of action for the damages. Possibly there may have been some special circumstances to take that case out of the general rule, which do not appear upon the record. Some *dicta* may be found, which, at first view, would seem to support this action; but when critically examined, and on looking at the cases referred to in support of them, it will be found that the heir cannot, in any case, maintain an action on a covenant made with his ancestor, for the breach of which the ancestor had, in his life-time, a perfect right to prosecute.

The court are, therefore, of opinion, that the judgment ought to be arrested.

Judgment arrested.[1]

VAN NESS, Appellant *v.* RANSOM et Al., as Temporary Administrators, Respondents.

215 N. Y. 557. 1915.

Cuddeback, J. The plaintiff in this action died in January, 1915, after the determination of the appeal at the Appellate Division, and this is a motion to substitute in her place and stead as plaintiff

[1] Compare *King* v. *Jones,* 5 Taunt. 418; *Kingdon* v. *Nottle,* 1 M. & S. 355; *Raymond* v. *Fitch,* 2 C. M. & R. 588.

the executor of her last will and testament. The motion is opposed upon the ground that the cause of action did not survive the plaintiff's death.

The plaintiff, Deborah Van Ness, and the defendant's intestate, Cornelius Henry Van Ness, were husband and wife, and they were divorced by a decree of the Supreme Court entered on May 23, 1867. The decree of divorce provided that the defendant, as a suitable allowance for the plaintiff's support during her life, should pay her alimony at the rate of $600 a year in equal quarterly payments. The husband died in 1911 without having ever paid any alimony as required by the decree. The wife brought this action upon the judgment to recover the alimony which had accrued prior to her husband's death.

The question is presented whether the cause of action for the arrears of alimony, which accrued prior to the death of her husband, survived on the death of his widow, the plaintiff.

The decree of 1867 dissolved the marriage relation, and each of the parties was freed from the obligations thereof. The indefinite and general duty of the husband to support his wife was changed and made specific and took the form of a judgment against him for the alimony awarded. As was said in *Livingston* v. *Livingston* (173 N. Y. 377, 381), after a decree in divorce, "the wife has no future rights, and the husband is under no future obligations, such as are founded upon, or spring out of, the marriage relation." So upon the entry of judgment in this case the husband became liable at the expiration of each and every period of three months to pay to his wife the sum of $150.

I do not see how, in justice, it can be said that if the husband failed to pay according to the terms of the judgment, and the wife thereafter died, the judgment in her favor lapsed as to the amount already accrued, and cannot be enforced by her personal representatives. The husband cannot be heard to say that the wife had not required the alimony for the purposes of her support. The court, by the decree, determined on a full consideration of the conditions existing, that it was proper the husband should pay the sum mentioned. If he did not pay, and the wife drew upon her own resources or obtained otherwise the means of support, the husband should not be relieved to that extent from the obligations of the judgment.

In other states where the question has come under consideration, it has been held that the arrears of alimony due a divorced wife at the time of her death may be collected by her executor or administrator. (*Miller* v. *Clark*, 23 Ind. 370; *Dinet* v. *Eigenmann*, 80 Ill. 274; *Coffman* v. *Finney*, 65 Ohio St. 61; *Gerrein* v. *Michie*, 122 Ky. 250.) The analogous proposition that the wife may hold the husband's estate for alimony due and unpaid at the time of his death has also been sustained. (*McIlroy* v. *McIlroy*, 208 Mass. 458, 464; *Martin* v. *Thison*, 153 Mich. 516.) Only one case has been called

to our attention in opposition to the motion, and that is *Faversham* v. *Faversham* (161 App. Div. 521).

In *Faversham* v. *Faversham* the court said that the alimony in arrears does not survive to the representatives of the wife, because it is a *personal obligation* in her favor. That decision rests to a large extent on the case of *Romaine* v. *Chauncey* (129 N. Y. 566, 575) which held that a wife's alimony cannot be taken by a creditor in discharge of a debt incurred by her prior to the date of the decree, because the alimony is a special fund provided for a specific purpose. It is "a species of property of a peculiar and specific character; created and existing for one purpose only, and whose express limitations take it out of the general rule." For a like reason, it has been held that a judgment for alimony is not affected by a discharge of the husband in bankruptcy. (*Wetmore* v. *Markoe*, 196 U. S. 68.) These and similar decisions have all been rendered in an effort of the courts to protect alimony and prevent it from being perverted even by the wife from the purposes for which it was intended.

But alimony is not a personal claim in the same sense that a cause of action for slander or assault is personal. It is personal in a sense that it is a provision made by the court in favor of the wife for her maintenance and support, and cannot be diverted from the purpose. It takes the place of the husband's liability which ended with the divorce. If there had been no divorce the husband's liability would have continued while the marital relation existed, and liability on the judgment should continue to the same extent. Therefore, the alimony sued for in this action, which accrued prior to the death of the wife, was not a personal claim that died with her, but a right which survived in favor of her personal representatives. To hold otherwise would be to defeat the object of the law and seriously impair the value of the decree in the wife's favor by depriving her of the credit which she would have to obtain means of support.

Though the court regards a judgment for alimony as property of a peculiar species, which needs the protection of the court, still it is a judgment rendered after a verdict or decision imposing a liability on the husband to pay a particular amount of money, and it does not abate until its purpose is accomplished, any more than any other judgment for money. (*Carr* v. *Rischer*, 119 N. Y. 117.)

We are not concerned on this motion with any defense which the defendants may have to the judgment of 1867, other than the one that the liability thereby created for alimony in arrears does not survive the wife's death. The notice of motion includes a motion to strike out the name of the defendant Rastus S. Ransom because he is dead.

I recommend that the plaintiff's motion be granted, both as to substituting the executor as plaintiff and striking out the name of Ransom as a defendant, without costs.

WILLARD BARTLETT, Ch. J., HISCOCK, COLLIN, HOGAN, CARDOZO and SEABURY, JJ., concur.

Motion granted.[1]

WYMAN, ADMINISTRATRIX *v.* WYMAN ET AL.

26 N. Y. 253. 1863.

APPEAL from the Supreme Court. The facts proved on the trial were these: John R. Wyman, the plaintiff's intestate, died in January, 1859, seised of a hotel, on which he had effected insurance to the amount of $3,000. The policies ran to Wyman, "his executors, administrators or assigns," and contained this clause, "the interest of the insured in this policy is not assignable unless by consent of this corporation, manifest in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." Wyman died wholly insolvent, leaving a widow, the plaintiff, who took out letters of administration, and two children, his heirs-at-law, who were defendants. In October succeeding Wyman's death the insured property was destroyed by fire. The insurers adjusted the loss and paid the amount to David B. Prosser, Esq., who had been appointed guardian of the infant heirs, under a stipulation entered into by all the parties concerned that Prosser should hold the money subject to the direction of the court, to be paid to the parties to whom it might be adjudged to belong, the heirs, the administratrix or certain creditors, who, before the intestate's death, had recovered judgment against him, which was a lien on the insured property for an amount exceeding its value. Prosser insisted upon his right to hold the money for the heirs, and the action was in the nature of a bill of interpleader to try the right of the several parties. The decision of the Supreme Court, at General Term in the Seventh District, was that the plaintiff, as administratrix of Wyman, was entitled to the money, and not the heirs-at-law. From this judgment Prosser, as guardian of his wards, appealed to this court.

EMOTT, J. The condition in the policy which is cited by the appellants refers to assignments or transfers of the policy itself or of the interest of the assured therein, and not to transfers of the title to the building insured, or the land on which it stood, whether such transfers are voluntary or by operation of law. The clause is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or termination of the interest of the assured in the policy, and not in the premises insured, which, when made without consent, is to avoid the policy under this condition.

[1] *Dinet* v. *Eigenmann*, 80 Ill. 274; *Miller* v. *Clark*, 23 Ind. 370; *Gerrein* v. *Michie*, 122 Ky. 250; *Coffman* v. *Finney*, 65 Ohio St. 61, *accord*. *Stones* v. *Cooke*, 8 Sim. 321 n., *contra*.

Policies of insurance against fire, however, are personal contracts with the assured. They are agreements to indemnify him against loss, and not guarantees of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. In the present instance, as ordinarily with us, in policies of insurance against fire, the contract is made with the assured, "his executors, administrators, and assigns." Both by force of these words, and from the nature of the contract itself, the right of action upon the policy at the death of John R. Wyman vested in his personal representative. It is not easy to see how any one but his administratrix, the present respondent, could have sustained actions on these policies which had been issued to John R. Wyman, for any loss, whether it had occurred before or after his death. It would have been a sufficient answer to any such action by the heirs, upon a policy of insurance, that it was a personal contract to which they were not parties, and that the right of action which it gave passed upon the death of the original assured to his personal representative, who not only succeeded to all his mere rights of action, but was specifically named in this contract itself.

This, however, is not an action to recover on a policy for a loss; nor is the question between the insurance companies and these parties, or either of them. The companies have indeed, as far as it lay with them, waived any condition in the policies, or any objection to the payment of the loss. The insurance money was paid to David M. Prosser, under a stipulation by which he became in effect a stakeholder, and by which the ultimate disposition of the money is left to the judgment of the courts upon the rights of the parties. The present is an equitable action to ascertain and determine those rights. The plaintiff claims this money as personal property and part of the assets of the estate of John R. Wyman, to which she is not only primarily but absolutely entitled as his administratrix; while the defendants insist that it belongs to them as his heirs-at-law, and the owners of the real estate upon which the building stood which was insured in the policies. It results that although we are not required formally to determine whether an action could have been sustained against the insurance company by either of these parties, yet the controversy between them cannot be determined except by ascertaining their legal or equitable rights to the amount due by the contract of insurance.

I have already intimated the difficulties in the way of an action to recover the insurance money by the heirs. On the other hand, it is said by the heirs that the administratrix could not have sustained such an action, because she had no interest in the property insured. It is unquestionable that the assured must have an insurable interest in the premises covered by the insurance at the time of the loss. But in the present case the title and interest in the lands, and with it the

ownership of the building, passed to the heirs; yet, as we have seen, the right of action upon the contract vested in the administratrix. These parties are not strangers to each other, however, but both of them derive title from the intestate by a devolution or transfer, which is not only not forbidden but is recognized by the policy. The policy does not avoid the contract upon the transfer of the title to the property by descent to the heir, and the devolution of the right of action to the administratrix, but expressly preserves the right of action, and continues and extends the privileges of the agreement to the executors and administrators of the assured. An action may be brought upon the contract of insurance by the latter as the successor of the original party, and as named in the instrument itself, to recover damages for the destruction or injury of the interest of the former in the property insured. Thus the contract of insurance by the death of John R. Wyman became by its terms a contract with his administratrix for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another. She would have been regarded as a party to whom, as a trustee of an express trust, the right to sue in her own name is preserved under the Code, § 118. The case would fall within the decision of *Considerant* v. *Brisbane*, 22 N. Y. 389. See *Freeman* v. *Fulton Fire Insurance Company*, 14 Abb. 404.

But it is difficult to reconcile the claim of the respondent to hold this insurance money, as part of the personal assets of the deceased, with this reasoning. The doctrine contended for by the appellant's counsel that not only the right of action, but the beneficial interest in the contract with the insurers, passed to the administratrix at the death of John R. Wyman, fails when it is put to this test. She had no legal estate and no beneficial interest in the premises. The title to the contract, and to a recovery upon it, was vested in her by the operation of law, and not by express assignment or transfer. She is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have the beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract of insurance belongs to the heir and not the personal representative of the deceased. The heir is the absolute owner of the property, entitled to its income and its enjoyment, and damnified by its destruction. He only can bring an action for any damage done to it after the title has passed to him from his ancestor. If the destruction of this building by fire had been the result of the malice or carelessness of another, the heirs of John R. Wyman would have had their action against such person and recovered damages for the very loss against which this contract is an

indemnity. They could have destroyed, removed or sold the building at any time, and neither for such an act nor for any injury by a third person, could the administratrix have sued at all. Her rights rest upon the contract of the insurers exclusively; and that is a contract, as I have already said, not of guaranty against the destruction of the property, but of indemnity against a loss to the person injured by such destruction. It follows that it is a contract which, even if made or continued with her, is, in truth, for the benefit of the parties to whom that property belonged. The building which was burned was real estate. As such it vested in the heirs immediately upon the death of the intestate, and its subsequent injury by fire could not convert it into personal estate, so as to divest the right of the heirs or give a new direction or character to the money payable by way of indemnity for their loss. Again, it was a part of the contract of insurance in this case, as is usual in policies of insurance against fire, that upon the destruction or injury of the property the insurers, if they chose, might repair or restore it in specie. If they had elected to take that course the expenditure which would thus have been made would, of course, have been entirely for the benefit of the heirs. The building repaired or replaced would have been theirs, because standing upon their lands. The theory of the payment of money in lieu of such actual reparation is that the party is thus enabled to replace what has been destroyed for himself instead of its being done by the insurers. This is very plain in the case of a partial loss where there is only an injury and not a destruction of the premises insured, but it is equally so in all cases. It would be a singular result if the election of the insurers could determine whether the heirs or the administratrix should take the benefits of their contracts; whether they would make compensation in money to the latter, or in kind to the former. And it is a strong implication from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance, inure to those who would, in the case of its literal performance, reap its fruits. My opinion is that in such a case as this the executor or administrator is a trustee for the heir who alone has been damnified, who has sustained the loss, and who is entitled to the indemnity.

It is supposed that such a construction of the contract and of the rights of the parties will be in conflict with the authorities. It is somewhat remarkable that so few cases can be found in which a question of such interest, and which must frequently arise, has been considered. An attentive examination of the few decisions to be found bearing upon the question will show that they do not really contradict the views which have now been expressed. The difficulties which have been found, and are stated by text writers, grow out of the character of the question, and the peculiar relations of the parties to the subject, rather than from judicial decisions. A leading case, which is much relied on in favor of the right of the personal represent-

ative, is *Mildmay* v. *Folgham*, 3 Ves. 471, in which Lord Chancellor Loughborough makes use of the strong expression, "it is impossible to make the executor a trustee." But that case was decided upon its special circumstances, and cannot be cited to control others which are not in all respects similar. Judith Tucker had insured a house by becoming a member of a company formed by deed for purposes of mutual insurance. She received a policy declaring that certain persons named as trustees would pay to her or her personal representatives, in accordance with the deed, any loss or injury to her property within seven years, and at the end of that time, if no loss occurred, would repay her deposit. The deed provided against survivorship to those remaining, in the event of a death of any person becoming a party to it; and that, in such event, the interest in the deed, and in the association, of a member dying, should survive to his personal representatives, who thereby became members of the company. It was also provided that, if the interest or property in the house insured of any person should expire, inasmuch as the insurance thereby became void, such person could adjust his account and have the deposit repaid him, and that the person succeeding to the property might come in and renew the insurance, becoming a member of the association in turn. The suit was a bill filed by the heir against the trustees named in the policy: that is, in effect, against the association. The Lord Chancellor held that this was a partnership, or a *quasi* partnership, and that no person could claim its benefits unless he was a member of the society according to its terms, which, he says, were very intelligible and consistent. The effect of the articles in his view evidently was, that the right to their benefits could only survive to the personal representatives, and no one else could succeed to the membership of the original assured. If the interest in the property insured passed to executors, no benefit was taken by the survivors from his death: the interest survived; and the right of membership attached to the representatives by force of the deed of partnership. If, however, the interest in the insured property did not vest in the executor, the only right which remained, according to the deed of insurance, was the right to claim a return of the deposit, which, he says, was with the executor, with whom the account must be made up. The heir or devisee could only come in anew and insure, or become a member of the society on his own account. In other words, the construction put upon the scheme of insurance exhibited by the policy, and the deed of association in that case, was, that by the death of the assured, and the transmission of her interest to a person who was not, and was not entitled to become, by succession, a member of the society, the insurance terminated, and the only rights of the executors and the heirs were a return of the deposit to the one, and a reinsurance by the other. The right of the executors to claim the insurance money upon a loss was not before the court; but the reasoning of the judgment, applied to the facts of the case, is equally

fatal to the claim of the executor and of the heir against the company.

There is a case decided by Sir Lancelot Shadwell, Vice-Chancellor, *Parry* v. *Ashley*, 3 Sim. 97, in which he held that the proceeds of a policy of insurance might be affected with a trust in favor of the parties entitled to the real estate. In that case certain real estate was charged with an annuity, and, subject to that, given to the defendant, who was sole residuary devisee and legatee and also executrix. The buildings were insured, and after the testator's death the executrix renewed the policy. They were burned, and it was held that the insurance money should be regarded as real estate, and preserved for the benefit of the annuitant, and not be disposed of by the executrix as general personal assets.

Haxall v. *Shippen*, 10 Leigh 136, is an exceedingly well considered case in the Court of Appeals of Virginia. One Shore died leaving a plantation by will to his widow for life, and remainder to his children. There was an insurance on the buildings, running to him, his heirs and assigns. The widow occupied the house and the policy was kept in force. She married Haxall, and afterwards the buildings were destroyed by fire. A suit in equity was brought upon the policy by Haxall and wife, and a decree made that the insurance money be paid to them, on their giving bonds to pay the principal to the children and heirs of Shore, at the death of their mother, Mrs. Haxall. The bond was given and the money received, and then used in rebuilding the house. At the death of Mrs. Haxall, suit was brought upon the bond, when the sureties commenced this action to stay its prosecution, on the ground that, by the expenditure of the money in rebuilding, the heirs had already had the benefit of it. The court held that the decree in the first suit, and the action of the parties under it, by giving the bond and receiving the money, was conclusive as to the rights of the parties, and that the subsequent application of the money in rebuilding was voluntary and could not prejudice the heirs. This was all which was necessary to the disposition of the case, although the opinion discusses the rights of the parties, independent of the first suit and judgment. The case was not like the present, as the policy ran to the assured, his heirs and assigns, and was regarded as a covenant real. An adjudication in favor of the heirs could not, therefore, be cited as in point in a case where the policy was a purely personal contract. But, on the other hand, the reasoning of the court is not against the view which we take of the rights of the heirs in such a case. The proceeds of the insurance are, indeed, alleged to be money, and not lands, and not affected with any trust which would defeat creditors and require their use in rebuilding. But, at the same time, they were not considered to have been so entirely converted into personalty as to become the property of others than the owners of the insured property at the time of its destruction. It may be that the judges of that

court would have so held in a case like this; but we are not obliged to dissent from their decision, or even to quarrel with their reasoning, as far as they went, in the case before them.

The case of *Carter* v. *Rockett*, 8 Paige 437, was between a mortgagee and the owner of property insured; and no question like the present arose. The owner had the entire interest both in the contract and the premises, and the only question was whether a mortgagee had by his mortgage merely a specific lien upon the money due to his mortgagor by the policy, simply because he had a lien upon the land, and because the value of his security was diminished by the destruction of the buildings.

So far as we have thus considered the rights of these parties, and so far as their rights as against each other are concerned, the heirs-at-law are equitably entitled to this fund. If there had been no other allegations or proofs in the case, than such as we have thus far adverted to, the judgment of the Supreme Court would have been erroneous and must have been entirely reversed. The claim of the plaintiff to this fund as part of the ordinary personal assets of the deceased cannot be supported.

But there are other equities which it is necessary to consider. It was alleged and proved that the deceased died largely in debt and probably insolvent, and that the heirs were irresponsible. It was found by the judge who tried the cause that there was a judgment to a considerable amount against John R. Wyman, which was a lien upon his real estate, and was held by persons not parties to this suit. Although this insurance money is to be treated as proceeds of real estate, it is nevertheless subject, as is the real estate itself, under our laws, to the payment of the debts of the ancestor. A court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors of the deceased to pursue them by the dilatory remedy of a new and distinct proceeding. Having possession of the fund, it is proper to retain it for the purposes of a just administration among the parties entitled to it. It is usual, in cases where the proceeds of real estate come into the hands of the court, and it is shown that there are debts which the real estate was liable to pay, or to be sold in the hands of the heir to satisfy, to order the money paid over to the personal representative, for distribution so far as may be necessary, holding him to account for any balance or resulting residue to the heirs. The direction in the judgment appealed from in this case, that the money in the hands of Mr. Prosser should be paid to the administratrix, in order primarily to the payment of the debts of the deceased, need not therefore in fact be modified, except in a single particular. That particular is one of which the respondent alone in her individual capacity, and not the appellants, can complain. As the widow of John R. Wyman, she is entitled to a dower interest prior to the rights of his creditors in this fund. That should have been preserved by the

judgment. It may be that any direction as to the ultimate disposition of the residue, after payment of the debts of the deceased, will be unimportant in this case. But the judgment taken with the complaint and the issue formed upon it by the answer, would imply, if not adjudge, that this money was regarded and ordered to be paid over by the court as part of the general personal estate, and should be distributed and accounted for as such. This was erroneous, and whether the error is of any practical importance to these parties or not, this also should be corrected. No account has indeed been taken of the estate, nor are we in a situation to dismiss the appellants from a right to call for such an account of this fund or of its ultimate disposition. Their right to do so should therefore be preserved. The judgment should be modified so as to provide for the satisfaction of the dower interest of the widow in the moneys in question: for the payment of the surplus to her as the administratrix, to be applied by her in satisfaction of debts entitled to payment out of such assets in the order and manner established by law; and that the residue, if any, be divided among the heirs-at-law of the deceased according to their rights as such heirs. Neither party to have costs of their appeal.

WIGHT and BALCOM, JJ., dissented; SELDEN, J., did not sit in the case.

Judgment modified, in accordance with above opinion.

KELLEY, ADMINISTRATRIX *v.* UNION PACIFIC RAILWAY CO.

16 Colo. 455. 1891.

THE amended complaint, *inter alia*, states in substance:

That one Edward S. Kelley died intestate February 21, 1889, and that plaintiff is his duly appointed and qualified administratrix.

That the defendant is a railway corporation duly organized, etc., and at the time of the happening of the grievances complained of was managing and operating a certain railroad between the city of Denver and the city of Leadville, Colorado, as a common carrier of passengers and freight for hire.

That the defendant had entered into a contract with the Pacific Express Company, for a valuable consideration to it paid by said express company, to transport its express packages and express messengers over the line of defendant's said railroad between the points aforesaid, and undertook, promised and agreed, in consideration of the premises, to safely carry said express packages and express messengers.

That on November 11, 1885, said Kelley was a route messenger in the employ of said express company, and while in the line and discharge of his duty as such was being carried over said railroad in one of the defendant's trains pursuant to the agreement aforesaid; that

defendant, not being mindful of its contract to safely carry said Kelley, did so carelessly and negligently manage its train in which said Kelley was riding, upon a steep grade on the line of said road at or near the town of Breckenridge, Colorado, that without notice or warning to said Kelley, and in some manner unknown to plaintiff, said train started down said steep grade and soon acquired a rapid velocity and so continued to run for a distance of four or five miles, when the same was thrown from the track and said Kelley was, without any fault or negligence on his part, so greatly injured by the shock therefrom as to produce insanity, by reason of which he was adjudged insane, etc., and was thereafter confined in the state lunatic asylum at Pueblo, Colorado, at which place he died as aforesaid, but not from the injuries caused by the negligence for which this suit is brought.

That by reason of said injuries said Kelley became, and during all his life-time thereafter remained, sick, sore, lame and disordered in mind and body, so as wholly to unfit him for following his usual occupation or from engaging in any business or earning any wages whatever. In consequence of which a loss and damage has occurred to the personal estate of the said deceased in the sum, etc. Prayer for judgment.

The defendant's demurrer to the amended complaint was sustained, and thereupon judgment was rendered in favor of defendant. The plaintiff brings the case to this court by writ of error.

MR. JUSTICE ELLIOTT delivered the opinion of the court.[1]

The several assignments of error present for determination but a single question: Did the cause of action stated in the amended complaint die with the person of Edward S. Kelley, or did it survive to his personal representative?

The maxim, "*Actio personalis moritur cum persona*," is as old as the common law itself. Nevertheless, for more than five hundred years, or since the reign of Edward the III., the rule has been the subject of legislative modification both in England and America. It would serve no useful purpose to attempt to trace the various changes of the ancient rule. The general rule which has prevailed for many years in this state is that actions at law do not die with the person; it is expressed in the following statute:

"All actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, and actions brought for the recovery of real estate, shall survive to and against executors and administrators." R. S. 1868, p. 682; Gen. Laws 1877, p. 978; Gen. Stats. 1883, sec. 3635; Mills' Annotated Statutes, sec. 4810.

At common law the question whether a right of action survived to the executor or administrator in a given case depended in most instances upon the form in which the action might or must be brought to obtain relief. The general rule was that if an action *ex contractu*

[1] A portion of the opinion is omitted.

might be sustained, the right of action survived; but if an action *ex delicto* must be resorted to, the right of action did not survive. 1 Chitty's Pleading (16th Am. ed.), p. 77 *et seq.;* Angell on Carriers, sec. 435.

Though the forms of civil action have been abolished in this state, it is often convenient and sometimes necessary to refer to them in construing statutes enacted before the adoption of the code. See *Toothaker* v. *City of Boulder*, 13 Colo. 224. Upon this ground counsel for plaintiff in error earnestly contends that, as the statute above quoted was enacted prior to the adoption of the code, the word "trespass" must be held to mean the technical action of trespass as it existed under our former practice, and that it does not include other actions *ex delicto* for injuries to the person. It is unnecessary upon this review to decide the point thus presented. The complaint is in form *ex contractu;* the facts therein set forth are sufficient in substance to support the plaintiff's case as an action of *assumpsit*, the very gist of the action as pleaded being the breach of the contract to carry safely. Besides, no recovery is sought for the alleged injuries to the person of the deceased, but only for damages to his estate which may be recovered in an action of *assumpsit* as well as in an action of *trespass* or *case*. 3 Sutherland on Damages, pp. 249, 259, 268; Patterson's Railway Accident Law, sec. 210, also 349; *Pittsburg City* v. *Grier*, 22 Pa. St. 65; *Nevin* v. *Pullman Palace Car Co.*, 106 Ill. 222; *Staley* v. *Jameson*, 46 Ind. 159; *Lemon* v. *Chanslor*, 68 Mo. 353.

The act of 1872 (Session Laws, p. 117), concerning damages to be awarded where the death of a person has been caused by the wrongful act of another, etc., was referred to in argument as having some bearing upon the construction to be given to the act above quoted, which is first found in its present form in the revision of 1868. The two acts are not *in pari materia*. A comparison will show that they have no legal connection or relation to each other. The act of 1868 was to prevent certain actions or causes of action *already accrued* from abating by reason of the death of either of the parties, without regard to the cause of such death. The act of 1872 created a new cause of action, to wit, the death itself. The act was not to prevent any cause or causes of action from abating; on the contrary, the cause of action provided for in the act did not accrue until death had already ensued. The language of the act was: "When the death of any person is caused by the wrongful act, misconduct, negligence or omission of another, the personal representatives of the former may maintain an action *therefor* against the latter," etc.

The present action is not to be confounded with the statutory remedy provided by the act of 1877 (Gen. Laws, p. 342). That act is a substitute for the act of 1872, *supra*. It provides for the recovery of damages resulting from the death of the party injured under certain circumstances, in case the death were caused by the wrongful

act, negligence or default of another. In this case, as the complaint expressly states, the death of said Edward S. Kelley was not caused by the negligence of the defendant; neither is the action brought to recover the damages resulting from his death to the parties entitled to sue under the act of 1877. On the contrary, the action is brought to recover only the pecuniary damages resulting to the deceased himself, and which are alleged to have accrued prior to his death. 2 Thompson on Negligence, p. 1285; *Needham, Adm'x,* v. *Grand Trunk R. R. Co.,* 38 Vt. 294; *Barley* v. *Chicago & Alton R. R. Co.,* 4 Bissell, 430. . . .

From the record before us it appears that the amended complaint and the matters therein stated are sufficient in law. The sustaining of the demurrer to it was therefore error. The judgment is accordingly reversed and the cause remanded.

Reversed.[1]

NOTE ON APPORTIONMENT.

Rent is not apportionable in point of time. If a tenant in fee simple rents land for life or for years and dies between rent days, the whole of the rent due after his death passes to his heirs, and his personal representative has no right to any portion thereof. *King* v. *Anderson,* 20 Ind. 385; *Stinson* v. *Stinson,* 38 Me. 593; *Mills* v. *Merryman,* 49 Me. 65; *Gibson* v. *Farley,* 16 Mass. 280; *Fay* v. *Halloran,* 35 Barb. 295; *Haslage* v. *Krugh,* 25 Pa. 97; *Clulow's Estates,* 3 K. & J. 689. And see *English* v. *Key,* 39 Ala. 113; *Anderson* v. *Robbins,* 82 Me. 422; *Sohier* v. *Eldredge,* 103 Mass. 345; *Perry* v. *Aldrich,* 13 N. H. 343; *Marshall* v. *Moseley,* 21 N. Y. 280; *Porter* v. *Sweeney,* 61 Tex. 213; *Hearne* v. *Lewis,* 78 Tex. 276; *Olun* v. *Fisher,* Croke Jac. 309; note to *Ex Parte Smyth,* 1 Swanst. 337. But see Stat. 77 Geo. II. c. 19, § 15 (1738).

Annuities are not apportionable. If annuitant dies between the days fixed for the payment of the annuity, his representative is entitled to no part of the annuity. *Heizer* v. *Heizer,* 71 Ind. 526; *Wiggin* v. *Swett,* 6 Met. (Mass.) 194; *Chase* v. *Darby,* 110 Mich. 314; *Henry* v. *Henderson,* 81 Miss. 743; *Wiegand* v. *Woerner,* 155 Mo. App. 227; *Manning* v. *Randolph,* 1 Southard 144; *Kearney* v. *Cruikshank,* 117 N. Y. 95; *Queen* v. *Lords of the Treasury,* 16 Q. B. 357.

But an annuity to an infant or to a married woman for maintenance is apportionable. *In re Laekawanna Iron & Coal Co.* 37 N. J. Eq. 26; *In re Cushing's Will,* 58 Vt. 393; *Howell* v. *Hanforth,* 2 W. Bl. 1016. An annuity in lieu of dower is apportionable. *Blight* v. *Blight,* 51 Pa. 420. *Tracy* v. *Strong,* 2 Conn. 659; *Mower* v. *Sanford,* 76 Conn. 504, *contra.*

The obligations of the English government called "consols" are in effect annuities. The government issues its obligation to pay a certain sum each year. The creditor cannot demand the principal sum, though the government can, at its option, return the amount borrowed. These obligations are treated like annuities payable during life, and are not apportionable. Thus, if an annuity is payable to A for life and after his death to B, upon A's death between dates of payment B is entitled to the whole of the installment due on the next day of payment. *Pearly* v. *Smith,* 3 Atk. 260; *Sherrard* v. *Sherrard,* 3 Atk. 502; *Wilson* v. *Harmon,* 2 Ves. Sr. 672.

Interest on money lent is apportionable, because it is conceived to accrue from day to day. *Foote, Appellant,* 22 Pick. 299; *Wilson's Appeal,* 108 Pa. 344 (bonds of private and municipal corporations); *United States Trust Co.* v. *Tobias,* 21 Abb. N. C. 393.

[1] And see *The City of Brussels,* 6 Ben. 370; *Winnegar* v. *Central Passenger Ry. Co.* 85 Ky. 547; *Bradshaw* v. *Lancashire & Yorkshire Ry. Co.* L. R. 10 C. P. 189; *Leggott* v. *The Great Northern Ry. Co.* 1 Q. B. D. 599.

An action against an attorney for negligence in examination of a title survives in favor of the personal representative. *Knights* v. *Quarles,* 2 Brod. & B. 102.

(United States, state and municipal bonds); *Banner* v. *Lowe*, 13 Ves. Jr. 135 (bond of an individual); *Re Rogers' Trusts*, 1 Dr. & Sm. 338 (debentures of railroad corporations). But in *Dexter* v. *Phillips*, 121 Mass. 178, it was held that the interest on coupon bonds of the United States, of a state, or of a corporation was not apportionable.

Dividends on stock of corporations are not apportionable. The whole of a dividend is payable to those who are entitled to the income of the stock when the dividend is declared. *Greene* v. *Huntington*, 73 Conn. 106; *Mann* v. *Anderson*, 106 Ga. 818; *Goodwin* v. *Hardy*, 57 Me. 143; *Foote, Appellant*, 22 Pick 299; *Clapp* v. *Astor*, 2 Edw. Ch. 379; *Hyatt* v. *Allen*, 56 N. Y. 553; *Ross' Estate*, 2 Kulp (Pa. Orph. Ct.) 472; *Sherrard* v. *Sherrard*, 3 Atk. 502; *Wright* v. *Tuckett*, 1 J. & H. 266. *Rutledge* v. *Rutledge*, Harp. Eq. 65, *contra*.

If the dividend is payable to stockholders of record on a certain day, holders of stock on that day, not holders on the date of the declaration, take the dividend. *Burroughs* v. *N. C. R. R. Co.*, 67 N. C. 376.

If a dividend is declared on Feb. 1 out of profits earned during the year ending Jan. 1, the person entitled to the income of that stock on Feb. 1 takes the whole dividend even though his right accrued after Jan. 1. *Bates* v. *Mackinley*, 31 Beav. 280. *Johnson* v. *Bridgewater Mfg. Co.* 14 Gray 274, *contra*.

As to extra dividends, compare *DeKoven* v. *Alsop*, 205 Ill. 309.

In the following jurisdictions statutes make apportionable sums of money not apportionable at common law. Arkansas, Digest (1904), § 4688; Delaware, Laws (1913), § 4548; Illinois, Annot. Stats. (1913), § 7075; Indiana, Annot. Stats. (1914), § 8069; Iowa, Annot. Code (1897), § 2988; Kentucky, Stats. (1915), §§ 2070, 3865; Massachusetts, Rev. Laws (1902), c. 141, § 25; Mississippi, Code (1906), § 2881; Missouri, Rev. Stats. (1909), § 7871; New Jersey, Comp. Stats. (1911), p. 3065; New York, Code Civ. Proc., § 2720; Acts (1914), c. 443, p. 1835; North Carolina, Rev. Stats. (1908), § 1988; Pennsylvania, Dig., Stats. (1905), p. 1111; Rhode Island, Gen. Laws (1909), c. 254, § 39; South Carolina, Code (1912), §§ 3494, 3495; Tennessee, Code (1896), § 4184; Virginia, Annot. Code (1901), §§ 2809, 2810; West Virginia, Code (1906), §§ 3422, 3423; Wisconsin, Stats. (1915), § 2193; Stats. 11 Geo. II, c. 19, § 15 (1738); Stats. 4 & 5 W. IV, c. 22 (1834); Stats. 14 & 15 Vict., c. 25 (1851); Stats. 23 & 24 Vict., c. 154 (1860); Stats. 33 & 34 Vict., c. 35 (1870).

STAT. 4 EDW. III., c. 7 (1330). Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had if they were in life.[1]

[1] "The administrator's right to bring actions for a tort done to the intestate's personal property in the lifetime of the intestate is founded upon an equitable construction of Stat. 4 Edw. 3." Note to Pinchon's Case, 9 Co. 89 a.

The remedy is extended to executors of executors by Stat. 25 Edw. 3, Stat. 5, c. 5 (1350). See *Rutland* v. *Rutland*, Croke El. 377 (trover allowed).

"It is clear that at common law the rule as to torts was correctly expressed by the maxim, '*Actio personalis moritur cum persona.*' This rule was greatly altered at an early stage of our legal history by 4 Edw. 3, c. 7, and this statute being remedial in its nature, and also those amending it, have been construed very liberally; they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature." — *Per* BRAMWELL, L. J., in *Twycross* v. *Grant*, 4 C. P. D. 40, 45.

The statute has been held not to extend to personal defamation. *Hatchard* v. *Mege*, 18 Q. B. D. 771. As to injuries to real property, see Stat. 3 & 4 W. 4, c. 42, § 2 (1833).

PULLING *v.* THE GREAT EASTERN RAILWAY. CO.

9 Q. B. D. 110. 1882.

STATEMENT OF CLAIM was in substance as follows: —

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime. By an order of the court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway was, by and through the negligence of the defendants in and about the working of the defendants' railway and the management of an engine of the defendants, knocked down and run over by the engine, and sustained personal injuries. It was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented from the time when he was so injured until his death from following his occupation, and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

Demurrer.

DENMAN, J. I think that our judgment must be in favor of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim *Actio personalis moritur cum persona.* To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, Law Rep. 10 C. P. 189, certainly does not go to that length, because the judgments in that case are expressly based upon the distinction in this respect between actions of contract and actions of tort, and upon

the fact that in that case the action was an action of contract. The case of *Leggott* v. *Great Northern Ry. Co.*, 1 Q. B. D. 599, was decided upon the same principle as *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, though Quain, J., expressly dissented from the decision in that case so far as his personal judgment was concerned, and Mellor, J., did not express any approval of it, but considered himself bound by it as an authority. There was not anything said in the judgments in *Leggott* v. *Great Northern Ry. Co.* to warrant our going to the length to which we should be going if in the present case we held that the maxim *Actio personalis moritur cum persona* did not apply. The duty, for breach of which the action was brought in that case, arose out of a contract, and the action was in substance for breach of contract to use due care towards the passenger whilst waiting for his train on the platform. Some of the expressions used by the judges in the case of *Twycross* v. *Grant*, 4 C. P. D. 40, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason of the failure to perform the statutory obligation to disclose certain contracts. The present is an altogether different case. Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

POLLOCK, B., concurred.

Judgment for the defendants.[1]

SPRADLIN *v.* GEORGIA RAILWAY & ELECTRIC CO.

139 Ga. 575. 1912.

BECK, J. Without discussing the relative merits of the views expressed in the opinion of the majority of the court and in the dissenting opinion in *Southern Bell Telephone & Telegraph Co.* v. *Cassin*, 111 Ga. 575 (36 S. E. 881, 50 L. R. A. 694), I do not think the decision in that case controls the case now before us. There a person who was injured settled with the party claimed to be liable for damages, resulting from the injury, presumably looking to the future as well as the past, and including any claim for permanent injury. The

[1] And see *Chichester* v. *Union Transfer Co.*, 1 McArthur 295; *Hilliker* v. *Citizens St. Ry. Co.*, 152 Ind. 86; *Sawyer* v. *Concord R. R. Co.*, 58 N. H. 517.

opinion of the majority of the court may be summarized in the following quotation from Tiffany on Death by Wrongful Act, § 124: "If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action." It was contended that the same rule applied to a suit brought by a widow, under the statute, for the homicide of the injured person, resulting from the injury. The dissenting Justices contended that the Georgia statute (Civil Code, § 4424), giving a right of action for a homicide to a widow, or children if no widow, was not a statute creating a survival or succession to the injured person's common-law right to sue for his injury, but was a statutory cause of action conferred on certain persons for a homicide, and was wholly independent of the common-law action or its settlement; and that another distinct statute (Civil Code, § 4421) made provision for the survival of a common-law action begun by the injured person, and the succession thereto by the administrator.

The present case does not involve a defense based on any act of the injured person in his lifetime, by which it was claimed that he settled or barred a right of action by his widow for his homicide.[1] However it may be *as to his acts*, at his death, the sections of the code above cited distinctly provide for two separate proceedings: (1) a carrying forward by the administrator of a common-law action already begun by the deceased; (2) a right to recover for the homicide by the widow, or children. In the former, a recovery can be had for pain and suffering, lost time, physician's bills, etc., accruing prior to the death of the injured person, but no recovery can be had for the "full value of his life." In the latter action, a recovery can not be had for any of the damages recoverable in the former, but for "the full value of the life of the deceased," from the time of his death. The damages recoverable in one case are not recoverable in the other; so that they do not overlap in that respect.

It is contended, however, that the administrator having made himself a party to the suit brought by the decedent in his lifetime, and his case having been tried and lost before the case which had been brought by the widow came to trial, the judgment in the administrator's case was a bar to the widow's suit. Why? The general rule is that a judgment is only a bar or an estoppel when it is

[1] Compare *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Perry* v. *Philadelphia, B. & W. R. Co.*, 77 Atl. (Del.) 725; *Southern Bell Telephone and Telegraph Co.* v. *Cassin*, 111 Ga. 575; *Sewell* v. *Atchison, T., & S. F. Ry. Co.*, 78 Kan. 1; *Donahue* v. *Drexler*, 82 Ky. 157; *Mchegan* v. *Boyne City G. & A. R. Co.*, 178 Mich. 694, 713; *Strode* v. *St. Louis Transit Co.*, 87 S. W. (Mo.) 976; *State* v. *United Railways & Electric Co.*, 121 Md. 457; *Rowe* v. *Richards*, 151 N. W. (S. D.) 1001; *Read* v. *The Great Eastern Railway Company*, L. R. 3 Q. B. 555; *Griffiths* v. *Dudley*, 9 Q. B. D. 357.

between the same parties or their privies, and involves actually or potentially the same matter. *Draper* v. *Medlock*, 122 Ga. 235 (50 S. E. 113, 69 L. R. A. 483, 2 Ann. Cas. 650). I have shown that the two suits were so different that what could be recovered in one could not be recovered in the other. Were they between the same parties or their privies? What was said in the majority opinion in the *Cassin* case, *supra*, as to the power of the injured man to regulate his own conduct, to lessen the value of his own life, to affect by admission the right to recover by his widow, and to settle the entire cause of action growing out of his injury, has no application to his administrator. As the latter could not recover for the full value of the life of the deceased, for which the widow alone could recover, evidently he could neither settle away nor talk away her suit. Could he destroy it by losing his case? She was no party to his case, and could not become so. She did not claim her statutory right as his privy. She had no right to be heard on the trial of his case, or to take part in it. Neither could the administrator be made a party to her case. If he recovered the proceeds would go into the general estate, and be subject to any debts of the decedent. If she recovered, the proceeds would not take that direction, or be subject to the debts of the deceased. Civil Code, § 4425. In so far as the administrator represented her as a beneficiary of the general estate, she was affected by the results of his suit. But in so far as the statute gave her a right to sue, she did not claim under or through him.

True each action grew out of the same tort; and it is said that the judgment against the administrator adjudged that there was no right to recover for that tort, and was binding on the widow. So far as she claimed under the administrator, that is true, as above, stated, but not to the extent claimed. Clearly one action would not furnish ground for plea in abatement of the other, for they were not to recover the same thing. Suppose, instead of losing his case, the administrator had recovered a small verdict. This would not and could not have included "the full value" of the life of the decedent, and could not have prevented the suit for such full value from proceeding. Now, if an adjudication against him was binding on the widow to establish that there was no right of recovery, it would seem that a recovery by him ought to be conclusive in her favor that there was a right to recover; and all she would have to do would be to introduce such a judgment, and prove the value of the life of the deceased. Would this be claimed?

Suppose her suit had come to trial first, would the judgment in it have been conclusive evidence for or against the administrator in his suit?

It may be singular that two rights of action may grow out of the same transaction, and possibly one be lost and the other won, but that merely arises from the statute, which — at least upon the death of the injured person — provides for two proceedings, one by his

administrator as to the common-law action (if one had been begun by the intestate), and the other by his widow (or children if no widow) for the full value of his life from the time of his death, instead of conferring on the administrator the entire right of action in case of death.

A somewhat similar situation exists where a minor is permanently injured by the tort of another. His father may sue to recover for the loss of the services of the minor until majority. The minor himself, by his next friend or guardian, may bring suit to recover for the permanent injury, not including the services for which his father may sue. See, in this connection, *Augusta Railway Co.* v. *Glover*, 92 Ga. 132 (4), 143 (18 S. E. 406); *Augusta Factory* v. *Davis*, 87 Ga. 648 (2), 649 (13 S. E. 577).

FISH, C. J., and ATKINSON, J., dissent. The other Justices concur.

Judgment reversed.[1]

JAMES CREGIN, RESPONDENT, *v.* THE BROOKLYN CROSS TOWN RAILROAD COMPANY, APPELLANT.

75 N. Y. 192. 1878.

APPEAL from order of the General Term of the City Court of Brooklyn, affirming an order of Special Term continuing this action in the name of Thomas Cregin as administrator of the plaintiff, he having died pending the action.

This action was brought by plaintiff to recover for the loss of the services and society of his wife, and for expenses of medical attendance, etc., the complaint alleging, in substance, that defendant received the wife of the plaintiff upon one of its cars as a passenger, that she paid her fare and that through the negligence of defendant and its servants that she was thrown down and seriously injured.

RAPALLO, J. We think the appellant is correct in the position that this is an action grounded in tort. The complaint alleges that the defendant received plaintiff's wife in one of its cars as a passenger; that she paid her fare, and while she was such passenger she was thrown down and injured by the negligence of the defendant. No contract with the plaintiff is alleged, and the *gravamen* of the complaint is the wrongful injury to the person of his wife.

The cause of action is therefore one which at common law would have abated by the death of the plaintiff, and the only point to be

[1] *Mahoning Railway Co.* v. *Van Alstine*, 77 Ohio St. 395; *Rowe* v. *Richards*, 32 S. D. 66, *accord*. *Williams* v. *Alabama, etc., Ry. Co.*, 158 Ala. 396; *Mooney* v. *Chicago*, 239 Ill. 414, *contra*. Compare *Mageau* v. *Great Northern Ry. Co.*, 103 Minn. 290; *Whitford* v. *Panama R. Co.*, 23 N. Y. 465; *Littlewood* v. *Mayor of New York*, 89 N. Y. 24; *Meekin* v. *Brooklyn Heights R. Co.*, 164 N. Y. 145; *Russell* v. *Sunbury*, 37 Ohio St. 372; *Quinn* v. *Chicago, M. & St. Paul Ry. Co.*, 141 Wis. 497; *Read* v. *The Great Eastern Railway Co.*, L. R. 3 Q. B. 555; *Seward* v. "*Vera Cruz*," 10 App. Cas. 59; *Robinson* v. *Canadian Pacific Ry. Co.*, [1892] A. C. 481.

considered is whether under the provisions of 2 Revised Statutes, 447, sections 1 and 2, it survives.

Section 1 preserves from abatement by death actions "for wrongs done to the property, rights, or interests of another." This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interests of a deceased party, except such as are enumerated and exempted in the following section: No. 2. These are, actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person *of the plaintiff*. These exceptions necessarily prevent the surviving of any action for slander, libel, assault and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person, provided the injury was not to the person of the plaintiff, but of some other party.

The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. The exceptions in the statute are such as scarcely to leave any conceivable action for injuries to other rights uncovered by them. But where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted in section 2. All pecuniary injuries (not resulting from the enumerated and excepted causes, such as assault and battery, slander, etc.), are placed upon the same footing when occasioned by a tort, as if arising from breach of contract, and such is the language of the statute. It declares that for wrongs done to the rights or interests of another (except the specified wrongs) the cause of action shall survive in the same manner and with the like effect in all respects as actions founded upon contracts. In *Haight* v. *Hayt* (19 N. Y., 464, 468), it is said by Grover, J., that the exceptions contained in the second section manifest the intention of the Legislature that all other actions founded upon torts should survive. And in the same case at page 474, Denio, J., says that the action (which was for false representations), was for a "wrong done" to "the rights and interests" of the plaintiffs, and the exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace this case.

The wrong done in the present case is alleged in the complaint to have been a wrongful injury to the person of the plaintiff's wife, whereby she was rendered permanently unable to attend to her household and other duties and the plaintiff was obliged to expend sums of money in procuring medicines and necessaries and employ-

ing physicians to treat her for her injuries, and that he had been and would be permanently deprived of her services and comforts.

This we think was a wrong done to the rights and interests of the husband. He had a right to the services of his wife, they were of pecuniary value to him, and any wrong, by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests. Adopting the construction that pecuniary rights and interests only are protected by the statute, these were plainly involved, and if the pleader had left out the word "comforts," the complaint would have disclosed an injury to pecuniary interests exclusively. We do not think that because in addition to the injury to these interests, the personal comfort of the plaintiff was interfered with, that circumstance should deprive his representatives of their remedy for the pecuniary injuries which he sustained, and which diminished his estate, nor do we think that it can be laid down as a rule of universal application to all classes of society that in such a case the injury to the personal feelings and comfort of the husband is the *gravamen* of the wrong and the pecuniary injury a mere incident, of which the law will not take notice independently of the former.

Where an injury is done to the person of *the plaintiff* the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists of the injury to the person; the damages are the consequence merely of that injury and where by the terms of the statute such a cause of action abates, the character of the damages cannot save it. But where the cause of action is not one of those enumerated in the statute the character of the damages may control the question whether there is an injury to the property, rights, or interests of the plaintiff.

The case of *Wade* v. *Kalbfleisch* (58 N. Y., 282) does not conflict with these views. The question of law involved in that case was whether the action was on contract, or for a personal injury. The majority of the court held that it was an action for a personal injury, and that although pecuniary interests might be incidentally involved, the injury to them did not constitute the cause of action. This clearly appears from the prevailing opinion of Church, Ch. J., who says at page 287, that the action (breach of promise of marriage) was *sui generis;* that the form of action was not material. That the controlling consideration was that it did not relate to property interests, but to personal injuries. Granting that it was not an action on contract, but was one for personal injuries, the conclusion necessarily followed. The injuries were to the person of the plaintiff, and the case was within the very letter of the exception contained in section 2 of the statute. Even though it was a tort affecting the rights and interests of the plaintiff, if it was an injury to her person it could not survive. The present action was for a tort which affected injuriously

the rights and pecuniary interests of the plaintiff. It was therefore for a wrong done to those rights and interests, and is covered by section 1 of the statute. The cause of action was not an injury to his person nor any of the others enumerated in section 2, and is not within the exception. It must therefore be held to survive with like effect as if the action were on contract.

The order should be affirmed, with cost.

All concur, except MILLER and EARL, JJ., absent at argument.

Order affirmed.[1]

CUTTING, ADMINISTRATRIX *v.* TOWER AND OTHERS.

14 Gray, 183. 1859.

ACTION of tort for fraud and deceit in selling to the plaintiff's intestate eight bushels of damaged and poisoned cornmeal, which caused the death of the intestate's horses when given to them as food.

At the trial in the Superior Court of Suffolk at March Term, 1858, the defendants objected that this action did not by law survive to the plaintiff. HUNTINGTON, J., overruled the objection, the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

[1] In *Cregin* v. *Brooklyn Crosstown R. Co.*, 83 N. Y. 595, at a second trial of the case, the court said, pp. 598–600: "We must understand, therefore, the charge to mean, as it plainly did mean, that a right to damages for the loss of the wife's society, and the comforts of that society, survived the death of the intestate and vested in the administrator. . . . We think the elements of damage are easily separable. The intestate, in his life-time, may justly be said to have had one cause of action against the defendant, viz., for damages resulting to him from personal injuries wrongfully done to his wife; but while the cause of action was in one sense single, his right to damages therefor was compound, and consisted of several and diverse elements. The loss of his wife's services, the expenses necessarily incurred by reason of the injury, were a pecuniary loss, and diminished his estate, and so survived to his administrator; but the loss of his wife's society, and the comforts of that society, and the right of action for that, died with him. It cannot be said to have survived to his personal representatives because something else did. . . . We said in this case, upon the question of the right of revival, that where the cause of action is not one of those enumerated in the statute, the character of the damages may control the question whether there is an injury to the property, rights or interests of the plaintiff; that is to say, that where an action is brought for the recovery of damages in the case referred to, wholly and entirely of such a character that they cannot survive to the personal representatives, the latter may recover them; where they are wholly of such a character that they cannot survive, and die with the party, there can be no revival, and the personal representatives cannot recover; but where a right of action for damages which can survive involves, mingled with it but separable from it, damages of such a character as die with the party, the revival of the action does not draw the latter with it and permit their recovery. This rule was violated in the submission of the case to the jury, and for that error the judgment should be reversed." And see *Potter* v. *Metropolitan District Ry. Co.*, 30 L. T. N. S. 765.

BIGELOW, J. This case falls within the general rule that actions of tort do not survive. The exception created by the Revised Statutes, c 93, § 7, that actions for damage done to real or personal estate shall survive, was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it results incidentally or collaterally therefrom, or from the doing of some other act, or the happening of some subsequent event over which the wrongdoer has no control. The gist of the action in the present case is the fraud and deceit practised by the defendants on the plaintiff's intestate in the sale of merchandise. For this an action to recover damages would have laid in his favor whether the meal which he purchased had ever been used or not. It was not therefore the fraudulent representation of the defendants, which operated directly to the injury of any personal property. It was the use to which the meal was put, that caused the damage for which the plaintiff now seeks to recover. But that was not the act of the defendants. It was only a pecuniary loss resulting incidentally from the sale of the meal. Suppose the meal, instead of being used by the plaintiff's intestate to feed his horses, had been made into bread for his family, and caused great sickness and suffering and loss of time to him and others. It would hardly be said that an action in such case would survive under Stat. 1842, c. 89, for damage to the person. The provisions of the Statutes allowing actions of tort to survive have been strictly construed, so as not to extend the exceptions beyond the clear intent of the Legislature. *Read* v. *Hatch*, 19 Pick. 47. *Nettleton* v. *Dinehart* 5 Cush. 543.

Exceptions sustained.[1]

JENKS, ADMINISTRATOR *v.* HOAG.

179 Mass. 583. 1901.

TORT to recover damages for an alleged conspiracy of the defendant, an attorney at law, with his client under examination as a poor debtor, to prevent, by false testimony of the client, the plaintiff's intestate from obtaining an order for the application of certain money of the client in satisfaction of an execution held by the plaintiff's intestate against her. Writ dated March 17, 1900.

The plaintiff's declaration alleged in substance, that the plaintiff's intestate recovered a judgment against Charles W. Shaw and Jennie G. Shaw; that execution thereon was duly issued and demand made upon the judgment debtors for payment, which was refused; that

[1] Under a modern statute the common-law action for deceit was held not to survive in favor of the personal representative of the plaintiff in *Lane* v. *Frawley*, 102 Wis. 373. But see *Billson* v. *Linderberg*, 66 Minn. 66; *Brackett* v. *Griswold*, 103 N. Y. 425.

thereafter Jennie G. Shaw was cited to appear and submit to an examination regarding her property; that she appeared and that the defendant acted as her attorney; that at the beginning of the examination she owned a half interest in a certain partnership, which half interest was worth $300 and was more than sufficient to satisfy the judgment; that during the progress of the examination she sold her interest in the partnership and received therefor $300, which was not exempt from execution; that the defendant, with full knowledge of the premises, conspired with the above named Jennie G. and Charles W. Shaw to conceal this property and to deceive the court as to the judgment debtor's condition; that Jennie G. Shaw in the presence of the defendant, and with his knowledge and assent, in answer to interrogatories submitted to her during the examination, stated that she had no property not exempt from execution except the partnership interest, which was of little or no value; that the defendant with knowledge of the sale of the partnership interest and the amount of money obtained therefor, presented a statement to the court, signed by Jennie G. Shaw and sworn to before the defendant as a justice of the peace, to the effect that only $40 had been realized from the sale of the partnership interest, which money had all been expended; that by reason of this conspiracy and the acts of the defendant the court was deceived and induced to believe that Jennie G. Shaw had no property not exempted from execution, and withheld its order requiring her to produce sufficient of her money to satisfy the judgment of the plaintiff's intestate, whereby the judgment was rendered worthless.

The defendant demurred to the declaration and also answered. The plaintiff demurred to the defendant's answer and also replied.

In the Superior Court, AIKEN, J., sustained the demurrer to the declaration and gave judgment for the defendant; and the plaintiff appealed.

KNOWLTON, J. This case is before us on the plaintiff's appeal from an order sustaining the defendant's demurrer, and directing a judgment for the defendant. A question much discussed by the parties is whether the averments of the declaration state a case of damage directly resulting from the defendant's wrong, which can be the foundation of a judgment in an action of tort. The allegations of the declaration virtually charge the defendant with subornation of perjury. He is accused of having conspired with his client to present false testimony which should prevent the plaintiff's intestate from obtaining an order for the payment to him of a sum of money. The defendant contends that this case is governed by the decisions in many cases which hold that no action lies for conspiring with a debtor to fraudulently dispose of his property to keep it away from his creditors. See *Lamb* v. *Stone*, 11 Pick. 527; *Wellington* v. *Small*, 3 Cush. 145; *Bradley* v. *Fuller*, 118 Mass. 239; *Adler* v. *Fenton*, 24 How. 407; *Austin* v. *Barrows*, 41 Conn. 287; *Klous* v. *Hennessey*,

13 R. I. 332; *Moody* v. *Burton*, 27 Maine, 427; *Hall* v. *Eaton*, 25 Vt. 458.

None of these cases is identical with the present case, and it is unnecessary to determine whether the principles established by them are so far applicable to the facts set out in the declaration as to be decisive of the question. We are of opinion that the demurrer was rightly sustained on another ground. This action is brought by the administrator of the original judgment creditor to whom the wrong is alleged to have been done. It is a general rule that actions of tort do not survive. Pub. Sts. c. 165, § 1. The statute creates certain exceptions to this rule, of which the only one necessary to be considered is that referring to actions "for damage done to real or personal estate." The plaintiff contends that this case falls within this exception, and argues that the suit is brought to recover for damage done to the judgment, which is personal estate.

It has been decided repeatedly that "a mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate." *Leggate* v. *Moulton*, 115 Mass. 552, and cases there cited. See also *Cutter* v. *Hamlen*, 147 Mass. 471. The statute was intended to give a remedy which should survive only for injuries of a specific character "to real or personal estate." In the case last cited there was no damage done to the plaintiff's real or personal estate, and in the present case there was no damage done to the judgment, considered as a specific part of the property of the plaintiff's intestate. The judgment was entirely unaffected by the defendant's alleged wrong. The wrong was not directed towards the judgment itself. At the most, it merely rendered ineffectual one of the methods by which the creditor hoped to collect the judgment. It seems to us plain, therefore, that the case does not fall within this exception, and that the entry must be.

Judgment affirmed.

FROHLICH *v.* DEACON.

181 Mich. 255. 1914.

CASE by Edward Frohlich, executor, and Hannah Frohlich, executrix, against John F. Deacon and others for conspiracy and unlawful combination and restraint of trade. An order sustaining a demurrer to the declaration is reviewed by the plaintiffs on writ of error. Affirmed.

BROOKE, J. The opinion of CHIEF JUSTICE MCALVAY proceeds upon the assumption, which I think is warranted in law, that the cause of action set up in plaintiffs' declaration does not survive at common law, nor under section 10117, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 1276). He holds, however, that said cause of action does survive under sections 10421, 10422, 3 Comp. Laws (5 How. Stat. [2d Ed.] §§ 13954, 13955). Under those sections it is apparent that

only those causes of action survive where the injured party in his lifetime might have brought "an action on the case for fraud or deceit." The question, therefore, arises: Are the alleged illegal acts ascribed to defendants such acts as would have sustained an action on the case for fraud or deceit brought by plaintiffs' testator in his lifetime? Upon this point, MR. JUSTICE MCALVAY says:

"The conduct charged in the declaration by plaintiffs against defendants may, without misnomer, be labeled fraudulent. It may further be said that this declaration was intended to state a cause of action for deceit brought about by fraud."

With this conclusion I find myself unable to agree. The essential elements of actionable fraud are said to be:

(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

20 Cyc. p. 13.

In *Parker* v. *Armstrong*, 55 Mich. 176 (20 N. W. 892), it is said:

"The cause of action being the successful use of false pretenses to get plaintiff to pay for the notes passed off on him, the declaration must, in order to support such a judgment as was rendered, show — *first*, what pretenses were made; *second*, that they were made by the defendants in person, or by authority and design; *third*, that they were material; *fourth*, that they were false and fraudulent, and deceived complainant; and, *fifth*, what defendants obtained by them."

The term "fraud and deceit" implies deception by means of fraudulent representations or otherwise, resulting in injury. While the adjective "fraudulent" is frequently used in the declaration to characterize the acts alleged to have been committed by the defendants, the use of that term alone is not sufficient to fix the quality of the acts, or to give them a legal significance which they do not intrinsically possess. It is nowhere averred in the declaration that the illegal acts alleged to have been committed by defendants misled or deceived plaintiffs' testator, nor that in consequence of those acts, being so misled, he acted to his injury. The acts described were illegal and oppressive. They were not deceptive nor fraudulent. The commission of those acts by the defendants gave to plaintiffs' testator in his lifetime a right of action on the case under the statute or at common law; but such an action cannot by any stretch of the imagination be considered one for fraud and deceit.

Without further considering the other objections raised by the demurrer to plaintiffs' declaration, I am of opinion that the foregoing conclusion is inevitable, and therefore fatal to plaintiffs' right to recover.

The order sustaining defendants' demurrer should be affirmed.

STONE, OSTRANDER, and STEERE, JJ., concurred with BROOKE, J.

McALVAY, C. J.[1] In this case the trial court sustained the demurrers of defendants to an amended declaration. Plaintiffs have brought the case to this court for review upon a writ of error asking for a reversal of the judgment entered upon the order sustaining such demurrers.

The facts in the case set forth in the amended declaration, which if well pleaded are admitted by the demurrers, are as follows:

Plaintiffs are executor and executrix of Simon Frohlich, deceased. The declaration, in three separate counts, charges a fraudulent conspiracy at common law on the part of defendants to ruin and destroy the credit, reputation, and business of the plaintiffs' testator, and also a violation of the anti-trust laws of this State.

Simon Frohlich, prior to January 1, 1906, owned and operated a factory in the city of Detroit. He was engaged in the manufacture and sale of sash, doors, and other building material. At this time he enlarged his business to include buying, manufacturing, wholesaling, retailing, and jobbing lumber and building materials, under the name and style of Frohlich Glass Company, investing in such enterprise a cash capital of $70,000. In two years he doubled the number of his employees and built up a business of $12,000 sales per month. He had prospects of continued expansion and success.

Defendants were competitors of Simon Frohlich and engaged in the lumber business, doing more than 90 per cent. of the wholesale, retail, and jobbing business in lumber in Detroit, and comprising about 75 per cent. of the lumber dealers. They fraudulently and unlawfully entered into a conspiracy and combination on or about June 1, 1907, actionable at the common law, and for the purpose of creating and carrying out restrictions in trade and commerce, contrary to the laws of Michigan, and for the purpose of destroying the credit, reputation, and business of Simon Frohlich.

By this combination and fraudulent conspiracy and their subsequent illegal acts in carrying out the same, defendants succeeded in ruining the lumber business of Simon Frohlich, and forcing him to sell practically all its tangible assets to one of them at an inadequate price of $20,000 less than its value, and in driving him out of this business.

Eighteen individuals, firms, and corporations are joined as defendants in this suit. Of these, 15 have demurred, and the grounds of these demurrers presented and relied upon in their briefs are as follows:

"(1) The declaration is not sufficiently specific, and does not set forth a cause of action.

"(2) Such action does not survive the death of Simon Frohlich.

"(3) Simon Frohlich was estopped by reason of the sale of the tangible assets of his business."

[1] A portion of this opinion dealing with the validity of the cause of action is omitted.

The second ground of demurrer relied upon by defendants raises in our opinion the most important question in the case. It requires the construction of the statute under which the action is brought in assumpsit, and upon which plaintiffs rely. The exact question is for the first time before this court. This is Act No. 195 of the Public Acts of 1897, entitled:

"An Act to provide for bringing actions of assumpsit in certain cases, and to provide that in such cases the cause of action shall survive."

The entire act reads:

"SEC. 1. In all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit and may be so declared.

"SEC. 2. The causes of action specified in section one of this act shall, upon the death of the person injured, survive to his personal representatives."

Sections 10421 and 10422, 3 Comp. Laws (5 How. Stat. [2d Ed.] §§ 13954, 13955).

The act in question, as its title indicates, is to provide that certain actions sounding in tort may be brought in assumpsit, and also to provide that in all cases where this may be done the causes of action shall survive. This presupposes the fact that before the enactment of this statute such actions could not have been brought in assumpsit, nor would the causes of action have survived. It will therefore be necessary, first, to determine the class of actions which may be brought under this statute in assumpsit, from which it will logically follow that all such causes of action will survive.

In this State provision is made for the survival of actions, as follows:

"In addition to the actions which survive by the common law, the following shall also survive: that is to say: actions of replevin, and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, *for negligent injury to persons*, for damages done to real or personal estate, *and actions to recover real estate where persons have been induced to part with the same through fraudulent representations and deceit.*" Section 10117, 3 Comp. Laws (5 How. Stat. [2 Ed.] § 12761).

To this is added, by the act under consideration, the provisions as quoted in sections 10421, 10422, *supra*.

All such actions specifically mentioned survive by force of these statutes, whether or not they were assignable at the common law. Rights of action which survive are also assignable. *Stebbins* v. *Dean*, 82 Mich. 385–388 (46 N. W. 778).

Section 10117, *supra*, was adopted by this State verbatim (except the portions italicized) from the State of Massachusetts. In construing this statute, this court, in *Stebbins* v. *Dean*, *supra*, in an opinion written by Mr. Justice Grant, adopted and followed the construction placed upon it by the Massachusetts courts, holding that the statute "was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party upon the property," citing *Cummings* v. *Bird*, 115 Mass. 346. Wisconsin, following Michigan, adopted the same statute, and in a line of decisions has given to it a like construction. The same is true of the courts of several of the States.

Upon the construction of this statute, where similar phraseology is used, there appears to be no disagreement among the better authorities.

The contention of the demurring defendants is that by the words of this new act under consideration no change has been made in this respect, and that the rule laid down in the case of *Stebbins* v. *Dean*, *supra*, controls in this case. They insist that the cause of action plaintiffs declare upon essentially sounds in tort, and is based upon an alleged conspiracy entered into by defendants to create and carry out a trust and monopoly, a restriction in trade and commerce in lumber and building material to injure plaintiffs' testator and drive him out of business, in violation of the common law, and of the Michigan anti-trust act, so called, as a result of which conspiracy plaintiffs' testator suffered damage to his business in his lifetime, and that under all the authorities such causes of action do not survive.

The dispute upon this question, then, is narrowed to a single proposition, and that is whether Act No. 195, Pub. Acts 1897, *supra*, by its express provisions, has made a change in the law by adding to the list of causes of action which survive.

This statute includes all cases arising from injuries produced by the false representations or conduct of any person for which an action on the case for fraud or deceit might be brought at law, and gives the person injured a right to bring an action in assumpsit for such injuries. The nature of the injuries are specified as injuries "either to the person, property or rights of another."

Dealing with the instant concrete case, we must determine whether, upon the facts stated in the declaration, plaintiffs' testator could have brought an action on the case at law for fraud or deceit against defendants to recover damages for the injury received.

The conduct charged in the declaration by plaintiffs against defendants may, without misnomer, be labeled fraudulent. It may further be said that this declaration was intended to state a cause of action for deceit brought about by fraud. In a similar case the action has been so recognized by the Supreme Court of Wisconsin in *Murray* v. *Buell*, 76 Wis. 657 (45 N. W. 667, 20 Am. St. Rep. 92). This was an action for conspiracy to monopolize the coal business in Milwaukee

to the injury of plaintiff's business, referring to which in a later case, *Lane* v. *Frawley*, 102 Wis. 373 (78 N. W. 593), that court said:

"That action is in all respects analogous to the action of deceit, resulting in loss and damage."

And of the case then under consideration it said:

"This, then, being a tort action for deceit to recover general damages caused by the fraud, and not to recover back specific property obtained by fraud, it is vigorously debated whether or not it survives."

In both these Wisconsin cases, *supra*, it was held that the actions did not survive by reason of the Wisconsin statutes which have at no time contained language indicative of the intention that they should survive.

The instant case is a tort action for deceit to recover general damages to the business of plaintiffs' testator caused by fraud during his lifetime, and not to recover damages for injuries to specific tangible property. If a recovery can be had, it will be because this court holds that the right of action survived under the statute in question.

This statute makes provision for a right of action in assumpsit for injuries done "either to the person, property or rights of another." By the addition of the words "or rights of another," it must be held that the clear intent of the legislature was to add to the actions which survived in this State another class of actions which were not theretofore included, namely: all actions for damages for injuries caused by the fraudulent representations or conduct of any person to the "rights of another."

The damages for which the instant suit has been brought are included in that class, and, as already stated, are damages, not to the specific property of plaintiffs' testator, but to his business. Such injury to his business was an injury to his rights.

The statute of the State of New York provides for the survival of actions for "wrongs done to the property, rights or interests of another." This language has been frequently before the court of last resort of that State for construction. In *Cregin* v. *Railroad Co.*, 75 N. Y. 192 (31 Am. Rep. 459), Mr. Justice Rapallo, speaking for the court said:

"The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. . . . Where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted."

That this New York statute declaring that causes of action for injuries to "property, rights and interests shall survive" is much broader than the statutes of Wisconsin, Massachusetts, and the former

statute of Michigan is apparent, and is recognized and admitted by defendants in one of their briefs. It is also recognized by the Supreme Court of Wisconsin in *John V. Farwell Co.* v. *Wolf*, 96 Wis. 10–18 (70 N. W. 289, 290, 37 L. R. A. 138, 65 Am. St. Rep. 22), where the court said:

"'The New York statute provides that 'actions for all wrongs done to property, rights or interests of another shall survive.' It is held that this language is so broad and comprehensive as to cover all injuries to rights of property, and is not confined to injuries, . . . as such — that it includes actions for damages for conspiracies to defraud and damages for deceit. *Bond* v. *Smith*, 4 Hun, 48; *Haight* v. *Hayt*, 19 N. Y. 464; *Lyon* v. *Park*, 111 N. Y. 350 [18 N. E. 863]; *Brackett* v. *Griswold*, 103 N. Y. 425 [9 N. E. 438]. These cases turn entirely on the meaning of the significant words 'property, rights and interests.'"

In our statute under construction the words "or rights of another" are of much broader significance than any of the language used in section 10117, 3 Comp. Laws, quoted *supra*, and are as comprehensive as the words quoted from the New York statute; and section 2 of the act provides that:

"The causes of action specified in section one of this act shall, upon the death of the person injured, survive."

Both upon reason and authority the conclusion cannot be avoided that the instant case is within the provisions of section 1 of this act, and that the cause of action by virtue of section 2 survived.

This same question was before the supreme court of the State of Wisconsin in *Lane* v. *Frawley*, *supra*, and upon the statute which contained words identical with those in the New York statute and those in the act of this State under consideration.

The contention was that the words were entitled to the same construction as given to them by the courts of the State of New York, and therefore the action in the case under consideration should be held to have survived. The section in the Wisconsin statute containing these words contained no words of survival as did the New York statute, and also our Act No. 195 under consideration. The court held the section was not intended to provide for the survival of any action, but merely to regulate the proceedings in such actions as otherwise survived.

An examination of that opinion makes it clear that, had the section contained specific words of survival, the court would have held that the cause of action survived. Our legislature has declared that such causes of action shall survive in words so clear that the intent cannot be mistaken. . . .

The judgment of the circuit court should be reversed and set aside, with permission to the demurring defendants, after notice of this decision, to plead to the declaration within the usual time allowed by rule.

KUHN, BIRD, and MOORE, JJ., concurred with MCALVAY, C. J.

Administrator de bonis non. On the death of an executor or an administrator the administrator *de bonis non* takes all the legal personal assets (see note on assets, *post* p. 666) of the deceased which have not been administered. See *Short* v. *Johnson*, 25 Ill. 489; *Slaughter* v. *Froman*, 5 T. B. Mon. 19; *Meservey* v. *Kalloch*, 97 Me. 91; *Byrd* v. *Holloway*, 6 Smedes & M. 323; *Potts* v. Smith, 3 Rawle 361; *Coleman* v. *M'Murdo*, 1 Rand. 51.

If property has been transferred by the executor for the payment of debts or legacies, it ceases to be assets.

At common law the administrator *de bonis non* could not sue for *devastavit*, because such a claim did not survive against the representative of an administrator or an executor. But a remedy was given by Stats. 30 Car. II, c. 7 (1678); 4 & 5 W. & M., c. 24, §12 (1693).

If in the course of administration the executor takes a note payable to himself, it is not assets. *Roy* v. *Squier*, 61 N. J. Eq. 182. But see *Burrus* v. *Roulhac*, 2 Bush 39; *Miller* v. *Alexander*, 1 Hill Eq. 25. The law of England is to the contrary. *Partridge* v. *Court*, 5 Price 412, 7 Price 591. Compare *Hirst* v. *Smith*, 7 T. R. 182.

If the executor takes a bond to himself in the course of administration, that is not assets. *Kendall* v. *Lee*, 2 Pen. & W. 482. See *Armitage* v. *Metcalf*, 1 Ch. Cas. 74; *Miller's Case*, Freem. K. B. 283, 284; *Hosier* v. *Arundell*, 3 B. & P. 7. Compare *Caulkins* v. *Bolton*, 98 N. Y. 511. But see *Bogert* v. *Hertell*, 4 Hill 492.

If the original administrator has deposited money to his account as administrator, the administrator *de bonis non* cannot recover this sum from the bank. *Slaymaker* v. *Farmers' Bank*, 103 Pa. 616; *Sibbs* v. *Philadelphia Saving Fund Society*, 153 Pa. 345. Compare *Beall* v. *New Mexico*, 16 Wall. 535; *United States* v. *Walker*, 109 U. S., 258; *Wilson* v. *Arrick*, 112 U. S. 83. *Clark* v. *Farmers' National Bank*, 124 Ky. 563, *contra*. See *Goods of Hall*, 1 Hagg. Eccl. 139; *Langford* v. *Mahony*, 4 Dr. & W. 81, 107.

If there has been a transfer by the executor in fraud of the estate with the collusion of the transferee, the administrator *de bonis non* may recover the property in equity from the transferee. *Cochran* v. *Thompson*, 18 Tex. 652; *Cubbidge* v. *Boatwright*, 1 Russ. 549. *Steel* v. *Atkinson*, 14 S. C. 154, *contra*.

In many of the United States the powers of an administrator *de bonis non* are extended. 2 Woerner, Am. Law of Adm. (2d ed.), §§ 351, 352.

CHAPTER VII.

INVENTORY.

STAT. 21 Hen. VIII., c. 5, Sec. 4 (1529). "The executor and executors named by the testator, or person so deceased, or such other person or persons to whom such administration shall be committed where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons two at the least, to whom the said person so dying was indebted, or made any legacy, and upon their refusal or absence, two other honest persons, being next of kin to the person so dying, and in their default or absence two other honest persons, and in their presence and by their discretions, shall make, or cause to be made, a true and perfect inventory of all the goods, chattels, wares, merchandises, as well moveable as not moveable whatsoever, that were of the said person so deceased." [1]

ORR. *v.* KAINES.

2 Ves. Sr. 194. 1750–1.

Bill for satisfaction of a legacy out of the assets against representatives of executor; who though living several years after death of testatrix, never exhibited an inventory, and had paid the whole of all the other legacies. Defendants admitted assets of the executor; and it came on upon the Master's report.

SIR JOHN STRANGE held these circumstances a foundation to say, he had given evidence of a receipt of assets against himself sufficient to answer this legacy as well as the rest, and the interest. Not exhibiting an inventory, which every executor ought, especially in a deficient estate, is an imputation upon him, whereas no laches can in this case be imputed to plaintiff in not calling on him. This, though not conclusive evidence, always inclines the court to bear harder on an executor, because he may at any time relieve himself by an inventory, if he finds the estate deficient. He is admitted both at law, on a plea of *plene administravit*, and on account of assets here to shew, that the money for which by solemn inventory on oath

[1] By Stat. 22 & 23 Car. II, c. 10 (1670) an administrator must file a bond conditioned on his making "a true and perfect inventory of all and singular the goods, chattels and credits of said deceased, which have or shall come to the hands, possession or knowledge of him, or into the hands and possession of any other person or persons for him, and the same so made do exhibit a cause to be exhibited into the registry."

The bond given under Stat. 20 & 21 Vict., c. 77 (1857) is conditioned on making an inventory when lawfully called on, and exhibiting it whenever required by law to do so. *Tristram & Coote*, Probate (14th. Ed.), p. 797.

he has charged himself, has by accident, as perhaps failure of some great merchant in the city, not come to his hands: so that its not being finally binding is one reason why he ought to exhibit an inventory. Next, every executor ought, after debts and funeral expenses, to see what remains for legatees; and if not enough for all, should apprize them, and pay all in proportion: whereas his paying the rest without difficulty within the year is the strongest evidence against him. The rule, of which there are several cases in *Eq. Abr.* is, that whenever an executor pays a legacy, the presumption is, he has sufficient to pay all legacies; and the court will oblige him, if solvent, to pay the rest, 2 P. W. 296, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund: although if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund. But this is the case of a solvent executor, whose representatives admit assets: it is impossible therefore for plaintiff to have satisfaction against any one but the executor, who has acted so as that the court will presume him to have received assets sufficient for this demand.[1]

B. & P. WILLOUGHBY Administrators *v.* McCLUER and HOLBROOK.

2 Wend. 608. 1829.

Error from the Chatauque common pleas. McCluer and Holbrook brought an action of assumpsit in the common pleas against the plaintiffs in error, who pleaded *plene administravit*, to which plea the plaintiffs replied, that at the commencement of the suit, the defendants had sufficient goods and chattels unadministered to pay and satisfy their demand, and concluded to the country.

On the trial of the cause, the plaintiffs proved their demand to the amount of $64.75. The defendants produced an inventory, regularly made by two appraisers and filed in the office of the surrogate, and proved payments made by them to the amount at which the property was appraised. The plaintiffs then offered to prove that the property had been undervalued in the appraisement which

[1] The early ecclesiastical law was very strict in regard to the filing of inventories. The neglect to file one precluded the executor from relying on the defence of want of assets. Swinburne, Testaments, Pt. 3, § 17, pl. 8. Under the modern English practice it is not necessary to exhibit an inventory and an account unless they are called for. *Phillips* v. *Bignell*, 1 Phillim. 239, 240. The rule in the United States is otherwise. 2 Woerner, Am. Law of Adm. (2d. ed.), § 315.

On the consequences of failure to file an inventory, see *Connecticut* v. *Smith*, 52 Conn. 557; *Moses* v. *Moses*, 50 Ga. 9; *Bourne* v. *Stevenson*, 58 Me. 499; *Leeke* v. *Beanes*, 2 Har. & J. 373; *McKim* v. *Harwood*, 129 Mass. 75; *Lewis* v. *Lusk*, 35 Miss. 696; *Commonwealth* v. *Bryan*, 8 Serg. & R. 128; *Patten* v. *Cox*, 9 Tex. Civ. App. 299; *Wilson* v. *Keeler*, 2 Chip. D. 16; *Ellis* v. *Johnson*, 83 Wis. 394; *Ritchie* v. *Rees*, 1 Add. Eccl. 144, 152; *Baker* v. *Brooks*, 3 Swab. & Tr. 32.

had been made, and that various articles of the property had been sold by the administrators for a greater sum than specified in the inventory.

This testimony was objected to, but received, and the defendants excepted. The plaintiffs then proved that the value of many articles enumerated in the inventory was double that specified in the same. Several witnesses were called by the plaintiffs to this point. One of the appraisers testified to the correctness of the appraisal; but the jury, under the charge of the court, found a verdict for the plaintiffs, on which judgment was entered that the plaintiffs recover of the defendants the sum found by the jury, viz. $64.81 and $52.71 costs, &c. to be levied *de bonis intestatoris si, &c. et si non de bonis propriis;* and if sufficient goods and chattels of the said defendants cannot be found to levy the said sum of $52.71, being for the costs and charges aforesaid, then the said sum of $117.52 (the *toto attingens*) to be levied of the lands and tenements of the defendants.

By the Court, Savage, Ch. J. By the English books, it seems to be understood that an inventory is not conclusive, either for or against an executor. *Toller's Law of Executors*, 249. 3 *Bacon's Abr.* 45. 2 *Fonbl.* 418, *n. a.* 1 *Salk.* 316. 2 *Ves.* 194. The executor is to be responsible for the assets of his testator; and there is no reason why, by procuring a low appraisement, he should pocket the difference between the actual and the appraised value; nor, on the other hand, that he should be responsible for the appraised value, when he can shew it was much beyond what the article would or did bring at a fair sale. The case of *Tappen* v. *Kain*, 12 *Johns. R.* 120, is supposed to establish the doctrine, that the truth or falsity of a plea of *plene administravit* must be determined by the inventory only. Such is the language of Platt, justice, who delivered the opinion of the court in that case, and, in reference to the facts of that case, it was correct. The point decided there was, that where the whole real estate is sold for the payment of debts, by order of the surrogate, the executor is not responsible for the avails to the creditor directly as for assets, but to the surrogate as trustee. The remark, that executors could only be responsible for the amount of the inventory, must be understood as applicable to such a case, and not as a universal rule; for, as such, it is entirely unsupported by authority.

A fair construction of the statute, 1 *R. L.* 311, supports the rule as decided by the court below. That no executor shall be cited in the court of probates to account only by the inventory, unless *by a creditor*, &c. plainly implies that the persons excepted may cite him to account by something else beside the inventory. This statute is substantially like the English statute, where the rule is, that at common law, the inventory is enquirable into, and the executor must account for all assets in his hands. The common pleas, therefore, decided correctly.

There is a clerical error in the record; but the judgment is sub-

stantially right. The administrators having pleaded a false plea, became personally responsible, not only for the costs but the debt. The form, however is, that it be collected *de bonis testatoris si*, &c. *et si non, de bonis propriis.*

Judgment affirmed.[1]

PURSEL, Executor, Appellant *v.* PURSEL, Administrator, Respondent.

1 McCarter (N. J.) 514. 1861.

This was an appeal from the decree of the Orphans Court of Hunterdon county. The facts of the case are fully stated in the opinion of the Ordinary.

The Ordinary.[2] John Pursel, of Alexandria, died in the month of May, 1850. The executor made and exhibited an inventory of the estate on the 1st of June, 1850. On the 20th of August, 1859, he exhibited his account for final settlement to the Orphans Court of the county of Hunterdon. By order of the Orphans Court the account was restated, and the executor was charged with additional items, viz., "Advance on the sale of personal property," "additional rent," and "additional interest on moneys received," amounting to $2098.67, "Eli Pursel's account, $839.13," and "Jacob Pursel's account, $300," claimed by the executor to have been paid by him, were stricken from the account of his disbursements, thus increasing the balance in the hands of the executor, for which he was held liable, $3237.80. There were also added to the account of the disbursements by the executor various items for court, counsel, and surrogate's fees. The account, thus corrected, was by the decree of the court settled and allowed. From this decree the executor has appealed, assigning, as grounds of appeal, each of the changes made in his account by the decree of the court.

The first ground of appeal is, that the court charged the executor with $164.17 advance on the sale of personal property. The evidence in support of this claim rests entirely upon statements furnished by the executor himself, and which, it is urged, should be regarded as conclusive against him.

In September, 1852, the executor made and exhibited under oath to the Orphans Court, an account of the personal estate and debts of the testator upon an application for authority to make sale of real estate for the payment of debts. In that account the executor charged himself with the vendue list $226.38, and with amount

[1] *McWillie* v. *Van Vacter*, 35 Miss. 428 *accord.* Compare *Chenery* v. *Davis*, 16 Gray 89; *Hodgman's Estate*, 10 N. Y. Supp. 491; *Matter of Shipman*, 82 Hun 108; *Matter of Mullon*, 145 N. Y. 98; *In re Van Sise*, 77 N. Y. Supp. 266; *Grant* v. *Reese*, 94 N. C. 720; *Ross* v. *Harbert, Blanks & Co.*, 1 Tex. Ct. App. Dec. Civ. Cas., § 1019; *Hamm* v. *Hutchins*, 19 Tex. Civ. App. 209; *Rogers* v. *Chandler*, 3 Munf. 65.

[2] Part of the opinion is omitted.

"received of individuals for grain $365.68." The proceeds of the sale of the goods and chattels and of the grain is thus made to amount to $592.06. The amount of goods and chattels and of grain contained in the inventory and appraisement amounts only to $425.89. This shows that the executor had then received on account of grain $166.17 more than the amount at which it was appraised; and with this sum, erroneously entered at $164.17, he was charged in the account as settled by the court.

The natural inference from the face of the inventory and of the account as stated is that the charge is correct. And this inference is confirmed by the executor's book of account, in which he has charged himself with a much larger amount for *grain appraised* than appears upon the face of the inventory. The court below therefore very naturally, and upon that evidence alone it would seem very properly decided that the executor should be charged with the excess received for grain above the amount specified in the inventory. Nor did the solution of the difficulty suggested at the bar of this court, to wit, that the excess had been received from the tenants of the Snyder farm, and was not included in the inventory, satisfactorily account for the discrepancy. The receipts from this source prior to the date of the account were much less than the excess, and if the receipts from the homestead farm had been included, they were much greater. It is obvious moreover, from the face of the account, that the executor was attempting to show the deficiency in the estate received, as compared with the appraisement. He states that deficit at $61.85. With this object in view, he would not have included receipts from any other source than the items comprised in the inventory without a special mention of that fact. With this view of the evidence this court, upon the argument, was satisfied that the court below were right in making the allowance. It is nevertheless an error which is susceptible of demonstration from the evidence in the cause.

Among the items contained in the inventory on file is the following: "A. Godley and others, $174.62." No explanation is given of the nature or origin of the indebtedness. The executor, in his evidence, states that that item is "for grain hauled to Godley's mills before the testator died." On turning to a rough and more specific inventory of the estate, which was never filed, and which was put in evidence not by the executor but by the exceptant, the following items appear:

Balance due from Augustus Godley,	$118.44
Due from Samuel Vansyckle,	42.18
Forman Vanderbelt, flaxseed,	14.00
Amounting to	$174.62

and corresponding in amount with the item contained in the inventory on file, as "A. Godley and others, $174.62."

In the executor's book of account, among the credits of moneys received, are found the following entries:

1850.	June 12, Cash from Samuel Vansyckle, appraised,	$42.18
	" 20, Received of Augustus Godley balance due for grain, appraised,	118.44
1851.	May 30, Cash of Forman Vanderbelt, appraised,	14.00
	Also the following:	
1850.	June 20, Cash received for oats, appraised,	8.40
"	Aug. 2, Cash of A. Godley, for grain appraised,	169.01
1852.	March 29, Cash of Charles Bartolette, for oats appraised,	13.65
	Amounting to	$365.68

These items were all received prior to the application by the executor to sell the real estate, and they constitute the precise amount with which the executor then charged himself as "received of individuals for grain." It is obvious, therefore, that the supposed discrepancy does not exist, and that the charge against the executor is erroneous. The whole difficulty has grown out of the defective character of the inventory, and exhibits in a striking point of view the impropriety of suffering such inventories to be filed. They are in direct contravention of the act of 1855. *Nix. Dig.* 561, § 49. They do not answer the design of the law. They fail to furnish to parties interested the very information which they were designed to supply. They often lead, as in this case, to useless litigation, imperil the rights of parties, impose upon courts the painful duty of groping for the truth in the dark, or of deciding by uncertain and unreliable tests of truth. The court below were misled entirely by the defects and virtual misrepresentations of the inventory, and this court was saved from falling into the same error mainly by exhibits offered on the part of the exceptant. In this case it is true the loss of the mistake would have fallen where it justly belonged, on the head of the party guilty of the negligence that occasioned it. But it falls, it is to be feared, too often upon unsuspecting heirs and confiding relatives, who are made the victims of the carelessness or fraud which covers up the real truth under the shelter of general and unintelligible inventories. I know that these inventories are frequently exhibited under the plea of economy, the executor retaining in his possession, as in this case, a more specific one. But that does not answer the design of the law. The parties interested are entitled to the information as well as the executor. It should be in their power, as well as in his, and should not be subject to the hazard of suppression or loss. I feel it my duty to protest earnestly against the practice, not only from the embarrassment it has occasioned in this particular case, but because I regard it as a fruitful source of litigation and as opening a wide door to fraud and injustice.

Justice requires that in all cases the requirements of the statute should be strictly complied with. . .[1]

[1] Compare *Craig* v. *McGehee*, 16 Ala. 41; *Arendale* v. *Smith*, 107 Ga. 494; *Estate of Fletcher*, 83 Neb. 156; *Pennington* v. *Newman*, 36 Okl. 594.

As to when an administrator or executor can or cannot be charged with the full amount of an item in the inventory, see *Estate of Taylor*, 52 Cal. 477; *Tell City Furniture Co.* v. *Stiles*, 60 Miss. 849; *Julian* v. *Abbott*, 73 Mo. 580; *Booker* v. *Armstrong*, 93 Mo. 49; *Harrington* v. *Ketcltas*, 92 N. Y. 40; *Hobbs* v. *Craige*, 1 Ired. 332; *Lightcaps Appeal*, 95 Pa. 455; *Anderson* v. *Piercy*, 20 W. Va. 282, 325; and see *ante*, p. 499, note.

"The form in which the inventory is made out and presented to the surrogate, is exceptionable. It is not, strictly speaking, an inventory, but rather an abstract or compendium of one. One item is, 'Cash, bonds, notes, &c., $13,993.06. Another, 'Household goods and kitchen furniture, $298.00.' A third, 'Horses, cows, and swine, $268.00.' This is a common mode, I believe, in some parts of the State. A particular list is made out in the first place, as the appraisement proceeds; but before it is sent to the office it is abbreviated so as simply to show gross amounts. This is done, as in the present case, without any intention of doing wrong; but the practice is not to be commended. Surrogates would do right to reject such papers as inventories. They often work injury to creditors and legatees, and sometimes involve executors and administrators in serious difficulty. In fact, it is almost impossible to settle any estate with intelligence and accuracy without other aids than they furnish." — *Per* Vroom C., in *Vanmeter* v. *Jones*, 2 Green H. W. 520, 538.

CHAPTER VIII.

INHERITANCE TAXES.

United States.

ESTATE TAX ACT, Sept. 8, 1916, c. 463, 39 Stat., p. 777. Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has

created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

SEC. 203. That for the purpose of the tax the value of the net estate shall be determined —

(a) In the case of a resident, by deducting from the value of the gross estate —

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

Illinois.

Acts 1909, p. 311, as amended by Acts (1913), p. 513. Sec. 1. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, in the following cases:

1. When the transfer is by will or by the intestate laws of this State, from any person dying, seized or possessed of the property while a resident of the State.

2. When the transfer is by will or intestate laws of property within the State and the decedent was a non-resident of the State at the time of his death.

3. When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this State, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. When any such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this Act.

4. Whenever any person, institution or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this Act, such appointment, when made, shall be deemed a taxable transfer under the provisions of this Act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this Act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

When the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the State of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent: provided, however, such rela-

tionship began at or before said person's fifteenth birthday and was continuous for said ten years thereafter: and, provided also, that the parents of such person so standing in such relation shall be deceased when such relationship commenced, or to any lineal descendant of such decedent born in lawful wedlock. In every such case the rate of tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person, when the amount so received exceeds in amount the sum of one hundred thousand dollars, and one dollar on each one hundred dollars of the clear market value of such property received by each person when the amount so received is one hundred thousand dollars or less; and at and after the same rates, respectively, for every less amount; provided, that any gift, legacy, inheritance, transfer, appointment or interest which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in the above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interest to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece or nephew or any lineal descendant of the same, in any such case the rate of such tax shall be four dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person when the amount so received exceeds the sum of twenty thousand dollars; and two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person when the amount so received is twenty thousand dollars or less. In all other cases the rate shall be as follows: On each and every one hundred dollars of the clear market value of all property and at the same rate for any less amount; on all transfers of ten thousand dollars and less, three dollars; on all transfers over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all transfers over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; on all transfers over fifty thousand dollars and not exceeding one hundred thousand dollars, six dollars; and on all transfers over one hundred thousand dollars, ten dollars: provided, that any gift, legacy, inheritance, transfer, appointment or interest which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

Sec. 2. When any property or interest therein or income therefrom shall pass or be limited for the life of another, or for a term of years, or to terminate on the expiration of a certain period the property of the decedent so passing shall be appraised immediately after the death of the decedent, and the value of the said life estate, term of years or period of limitation shall be fixed upon mortality tables, using the interest rate or income rate of five per cent; and the value

of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years or period of limitation from the fair market value of the property so limited, and the tax on the several estate or estates, remainder or remainders, or interests shall be immediately due and payable to the treasurer of the proper county, together with interest therein, and said tax shall accrue as provided in section three (3) of this Act, and remain a lien upon the entire property limited until paid: provided, that the person or persons, body politic or corporate, beneficially interested in property chargeable with said tax, elect not to pay the same until they shall come into actual possession or enjoyment of such property, then in that case said person or persons, or body politic or corporate shall give bond to the People of the State of Illinois in a penal sum three times the amount of the tax arising from such property, limited with such sureties as the county judge may approve, conditioned for the payment of the said tax and interest thereon at such time or period as they or their representatives may come into the actual possession or enjoyment of said property; which bond shall be filed in the office of the county clerk of the proper county: provided, further, that such person or persons, body politic or corporate, shall make a full verified return of said property to said county judge and file the same in his office within one year from the death of the decedent, with the bond and sureties as above provided; and further, said person or persons, body politic or corporate shall renew said bond every five years after the date of the death of the decedent.

Sec. 3. All taxes imposed by this Act, unless otherwise herein provided for, shall be due and payable, at the death of the decedent, and interest at the rate of six per cent per annum shall be charged and collected thereon for such time as said taxes are not paid: provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of five per cent shall be allowed and deducted from said tax; and in all cases where the executors, administrators or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section 2 of this Act, for the payment of said tax, together with interest.

Sec. 25. When property is transferred or limited in trust or otherwise, and the rights, interest or estates of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred: Provided, however, that on

the happening of any contingency whereby the said property, or any part thereof is transferred to a person, corporation or institution exempt from taxation under the provisions of the inheritance tax laws of this State, or to any person, corporation or institution taxable at a rate less than the rate imposed and paid, such person, corporation or institution shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person, corporation or institution should pay under the inheritance tax laws, with interest thereon at the rate of 3 per centum per annum from the time of payment. Such return of over-payment shall be made in the manner provided for refunds under section eight.

Estates or interests in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or account of any valuation theretofore made of the particular estates for the purpose of taxation, upon which said estates or interests in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devise it shall be taxed as if there were no possibility of such divesting.

Massachusetts.

Acts (1909), c. 490, Part IV (as amended by subsequent legislation[1]): Sec. 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is

[1] Acts (1909), cc. 490, 527; Acts (1911), c. 502; Acts (1912), c. 678; Acts (1913), cc. 498, 689; Acts (1916), c. 268.

by the laws of this commonwealth exempt from taxation or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of the commonwealth or any city or town within this commonwealth for public purposes, shall be subject to a tax as follows: —

Class A. In case such property or interest therein shall so pass or any beneficial interest therein shall so accrue to or for the benefit of a husband, wife, parent, child, grandchild, adopted child or adoptive parent of the deceased, the tax shall be at the following rates: — on its value not exceeding twenty-five thousand dollars, at one per cent; on the excess of its value over twenty-five thousand dollars, and not exceeding fifty thousand dollars, at two per cent; on the excess of its value over fifty thousand dollars, and not exceeding two hundred and fifty thousand dollars, at four per cent; on the excess of its value over two hundred and fifty thousand dollars, and not exceeding one million dollars, at five per cent; and on the excess of its value over one million dollars, at six per cent.

Class B. In case such property or interest therein shall so pass or any beneficial interest therein shall so accrue to or for the benefit of a lineal ancestor or descendant other than those included in *Class A*, a wife or widow of a son, the husband or a daughter, or a lineal descendant of an adopted child, or a lineal ancestor of an adoptive parent of the deceased, the tax shall be at the following rates: — on its value not exceeding ten thousand dollars, at one per cent; on the excess of its value over ten thousand dollars, and not exceeding twenty-five thousand dollars, at two per cent; on the excess of its value over twenty-five thousand dollars, and not exceeding fifty thousand dollars, at four per cent; on the excess of its value over fifty thousand dollars, and not exceeding two hundred and fifty thousand dollars, at five per cent; on the excess of its value over two hundred and fifty thousand dollars, and not exceeding one million dollars, at six per cent; and on the excess of its value over one million dollars, at seven per cent.

Class C. In case such property or interest therein shall so pass or any beneficial interest therein shall so accrue to or for the benefit of a brother, sister, step-child, step-parent, half brother, half sister, nephew or niece of the deceased, the tax shall be at the following rates: — on its value not exceeding ten thousand dollars, at three per cent; on the excess of its value over ten thousand dollars, and not exceeding twenty-five thousand dollars, at five per cent; on the excess of its value over twenty-five thousand dollars, and not exceeding fifty thousand dollars, at seven per cent; on the excess of its value over fifty thousand dollars, and not exceeding two hundred and fifty thousand dollars, at eight per cent; on the excess of its value over two hundred and fifty thousand dollars, and not exceeding one million dollars, at nine per cent; and on the excess of its value over one million dollars, at ten per cent.

Class D. In case such property or interest therein shall so pass or any beneficial interest therein shall so accrue to or for the benefit of any person not included in any of the foregoing classes, the tax shall be at the following rates: — on its value not exceeding ten thousand dollars, at five per cent; on the excess of its value over ten thousand dollars, and not exceeding twenty-five thousand dollars, at six per cent; on the excess of its value over twenty-five thousand dollars, and not exceeding fifty thousand dollars, at seven per cent; on the excess of its value over fifty thousand dollars, and not exceeding two hundred and fifty thousand dollars, at eight per cent; on the excess of its value over two hundred and fifty thousand dollars, and not exceeding one million dollars, at nine per cent; and on the excess of its value over one million dollars, at ten per cent.

Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for such taxes, with interest, until the same have been paid; but no property or interest therein, which shall pass or accrue to or for the use of a husband, wife, father, mother, child, adopted child or adoptive parent of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this act, and no tax shall be exacted upon property or interests so passing or accruing which shall reduce the value of such property or interest below the amount of the above exemptions. All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will or codicil, or deed or other instrument creating the grant or gift, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor.[1]

Sec. 5. In every case where there shall be a bequest or grant of personal estate made or intended to take effect in possession or enjoy-

[1] Acts (1909), c. 527. Sec. 8. Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. . . .

ment after the death of the grantor, to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, whether conditioned upon the happening of a contingency or dependent upon the exercise of a discretion, or subject to a power or appointment or otherwise, the executor or administrator or grantee may deposit with the treasurer and receiver general a sum of money sufficient in the opinion of the tax commissioner to pay all taxes which may become due upon such bequest or grant, and the person or persons having the right to the use or income of such personal estate shall be entitled to receive from the commonwealth interest at the rate of two and one-half per cent per annum upon such deposit and when said tax shall become due the treasurer and receiver general shall repay to the persons entitled thereto the difference between the tax certified and the amount deposited; or any executor, administrator, trustee or grantee, or any person interested in such bequest or grant may give bond to a judge of the probate court having jurisdiction of the estate of the decedent, in such amount and with such sureties as said court may approve, with the condition that the obligor shall notify the tax commissioner when said tax becomes due and shall then pay the same to the treasurer and receiver general.

Sec. 6. Except as hereinafter provided, said tax shall be assessed upon the actual value of the property at the time of the death of the decedent. In every case where there shall be a devise, descent, bequest or grant to take effect in possession or enjoyment after the expiration of one or more life estates or a term of years, the tax shall be assessed on the actual value of the property or the interest of the beneficiary therein at the time when he becomes entitled to the same in possession or enjoyment. The value of an annuity or a life interest in any such property, or any interest therein less than an absolute interest, shall be determined by the "American Experience Tables" at four per cent compound interest.[1]

New York.

Laws (1909), c. 62 (as amended by subsequent legislation[2]). Sec. 220. A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise,

[1] Acts (1913), c. 689 adds at the end of this section: When an annuity or a life interest is terminated by the death of the annuitant or life tenant, and the tax upon such interest is not due and has not been paid in advance, the value of said interest for the purposes of taxation under this act shall be the amount of the annuity or income actually paid or payable to the annuitant or life tenant during the period for which he was entitled to the annuity or was in possession of the life estate. See Sec. 7.

[2] Laws (1910), cc. 600, 706; Laws (1911), cc. 732, 800; Laws (1912), c. 206; Laws (1913), cc. 356, 639, 795; Laws (1915), cc. 383, 664; Laws (1916), cc. 548–551.

to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint stock company or association or partnership, and the decedent was a nonresident of the state at the time of his death.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint-stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly within the state of New York, in such proportion as the value of the real property of

such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition or property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. Whenever intangible property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.

8. The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed.

Sec. 221. Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the

moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes. There shall also be exempted from and not subject to the provisions of this article all property or any beneficial interest therein so transferred to any father, mother, husband, wife, widow or child of the decedent, grantor, donor, or vendor if the amount of the transfers to such father, mother, husband, wife, widow or child is the sum of five thousand dollars or less; but if the amount so transferred to any father, mother, husband, wife, widow or child is over five thousand dollars, the excess above these amounts, respectively, shall be taxable at the rates set forth in the next section.

Sec. 221–*a*. 1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedent, grantor, donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of one per centum on any amount up to and including the sum of twenty-five thousand dollars; two per centum on the next seventy-five thousand dollars or any part thereof; three per centum on the next one hundred thousand dollars or any part thereof; four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars or more, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers

shall be at the rate of two per centum on any amount up to and including the sum of twenty-five thousand dollars; three per centum on the next seventy-five thousand dollars or any part thereof; four per centum on the next one hundred thousand dollars or any part thereof; five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of five per centum on any amount up to and including the sum of twenty-five thousand dollars; six per centum on the next seventy-five thousand dollars or any part thereof; seven per centum on the next one hundred thousand dollars or any part thereof; eight per centum on the amount representing the balance of each individual transfer.

Sec. 222. All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six.

Sec. 230. In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the state comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

. . . . . .

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except

that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article; and the executor or trustee of

each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller.

UNITED STATES *v.* PERKINS.

163 U. S. 625. 1895.

This was a writ of error to an order of the General Term of the Supreme Court, affirming an order of the Surrogate's Court of Suffolk County, assessing an inheritance tax of $3964.23 upon the personal property of William W. Merriam, bequeathed by him to the United States.[1] . . .

Mr. Justice Brown, after stating the case, delivered the opinion of the court. This case raises the single question whether personal property bequeathed by will to the United States is subject to an inheritance tax under the laws of New York.

By chapter 483, Laws of 1885, as amended by chapter 215, Laws of 1891, it was enacted as follows: "Sec. 1. After the passage of this act all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, . . . to any person or persons, or to any body politic or corporate, in trust or otherwise, . . . other than to or for societies, corporations and institutions now

[1] Part of the statement of facts is omitted.

exempted by law from taxation, or from collateral inheritance tax, shall be and is subject to a tax at the rate hereinafter specified," etc.

By chapter 399 of the Laws of 1892, Vol. 1, entitled "An act in relation to taxable transfers of property," (sec. 1,) "a tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, . . . to persons or corporations not exempt by law from taxation on real or personal property." By sec. 23 of this law certain previous acts were repealed, subject to a saving clause contained in sec. 24, to the effect that the repeal should not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the passage of this act. The twenty-fifth section also provided that the provisions of this act, so far as they were substantially the same as those of the laws existing April 30, 1892, should be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments.

The testator Merriam died January 30, 1889, but the tax was not assessed until February 16, 1893, after the act of 1892 had taken effect. Upon this state of facts, the Court of Appeals of New York was of opinion that the case was covered by the act of 1892, although it was thought that the legacy was subject to taxation whether it was taxed under that or the previous acts. This ruling as to the applicability of the act of 1892 seems to conflict with the case of *Seaman*, 147 N. Y. 69, but the difference is not material in this case.

The case really presents two questions:

1. Whether it is within the power of the State to tax bequests to the United States.

2. Whether, under these statutes, the United States are a corporation exempted by law from taxation.

1. While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. "By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal." 2 Bl. Com. 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of property did not

extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child; one third, if he leaves two children; one fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

In this view, the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. This was the view taken of a similar tax by the Court of Appeals of Maryland in *State* v. *Dalrymple*, 70 Maryland, 294, 299, in which the court observed: "Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property . . . to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain

premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States, *Matter of the Estate of Swift*, 137 N. Y. 77, in which it is said, p. 85, that "the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons." *Matter of Hoffman*, 143 N. Y. 327; *Schoolfeld's Executor* v. *Lynchburg*, 78 Virginia, 366; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Cullum*, 145 N. Y. 593. In this last case, as well as in *Wallace* v. *Myers*, 38 Fed. Rep. 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the *estate* of the decedent, or the privilege of acquiring property by inheritance. *Eyre* v. *Jacob*, 14 Grattan, 422; Dos Passos on Inheritance Tax Law, chap. 2, sec. 8, and cases cited. Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 8 How. 490, 493, Mr. Chief Justice Taney remarking that "the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." To the same effect is *United States* v. *Fox*, 94 U. S. 315.

We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

2. [The learned judge held that under the statutes of New York the United States are not a corporation, exempted from inheritance tax and continued as follows: — Ed.]

Upon the whole, we think the construction put upon the statute

by the Court of Appeals was correct, and the judgment of the Supreme Court is, therefore,

Affirmed.

Mr. Justice Harlan dissented.[1]

BLACKSTONE *v.* MILLER.

188 U. S. 189. 1902.

Mr. Justice Holmes[2] delivered the opinion of the court.

This is a writ of error to the Surrogate's Court of the county of New York. It is brought to review a decree of the court, sustained by the Appellate Division of the Supreme Court, 69 App. Div. 127, and by the Court of Appeals, 171 N. Y. 682, levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of $10,692.24, due to the deceased by a firm, and of the net sum of $4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistently with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the Trust Company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company, it gave its check upon one of its banks of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. . . . 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a nonresident of the State at the time of his death." Laws of 1896, c. 908, § 220, amended, Laws of 1897, c. 284; 3 Birdseye's Stat. 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. It is objected to the New York tax that the property was not within the State, and that the courts of New York had no jurisdiction; that

[1] Compare *Magoun* v. *Illinois Trust Co.* 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41; *Plummer* v. *Coler*, 178 U. S. 115; *People* v. *Griffith*, 245 Ill. 532; *Booth* v. *Commonwealth*, 130 Ky. 88; *Minot* v. *Winthrop*, 162 Mass. 113.

A short history of legacy and inheritance taxes is to be found in *State* v. *Alston*, 94 Tenn. 674.

[2] The statement of facts is omitted.

if the property was within the State it was only transitorily there, *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596, 599, 600, that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the State of New York, and that it is contrary to the Fourteenth Amendment.

In view of the state decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *Morley* v. *Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162, 166. We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the State, if otherwise the right to tax the transfer belonged to the State. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley* v. *Rhoads*, *ante*, p. 1, and *Diamond Match Co.* v. *Village of Ontonagon*, *ante*, p. 84, present term. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the State has a right to tax the transfer by will of such deposit.

The answer is somewhat obscured by the superficial fact that New York, like most other States, recognizes the law of the domicil as the law determining the right of universal succession. The domicil, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent the succession determined by the law of the domicil is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicil. The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all. See *Crapo* v. *Kelly*, 16 Wall. 610; *Chipman* v. *Manufacturers' National Bank*, 156 Massachusetts, 147, 148, 149.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the

chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 587, 592. See *Mager* v. *Grima*, 8 How. 490, 493; *Coe* v. *Errol*, 116 U. S. 517, 524; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; and for state decisions *Matter of Estate of Romaine*, 127 N. Y. 80; *Callahan* v. *Woodbridge*, 171 Massachusetts, 593; *Greves* v. *Shaw*, 173 Massachusetts, 205; *Allen* v. *National State Bank*, 92 Maryland, 509.

No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41.

The question then is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Matter of Houdayer*, 150 N. Y. 37; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *City National Bank* v. *Charles Baker Co.*, 180 Massachusetts, 40, 42. In view of these cases, and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States* v. *Perkins*, 163 U. S. 625, 628, 629; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principal has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710. See *Wyman* v. *Halstead*, 109 U. S. 651. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter

that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Massachusetts, 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney* v. *Nelson*, 183 U. S. 144, 147. The fact that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 53. The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams* v. *Batchelder*, 173 Massachusetts, 258. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of

New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager* v. *Grima*, 8 How. 490; *Brown* v. *Houston*, 114 U. S. 622, 635; *Wallace* v. *Myers*, 38 Fed. Rep. 184. It does not violate the Fourteenth Amendment. See *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question whether the property was to be regarded as *in transitu*, if material, must be regarded as found against the plaintiff in error.

Decree affirmed.[1]

GALLUP'S APPEAL.

76 Conn. 617. 1904.

APPEAL from an order and decree of the Court of Probate for the district of Meriden determining the amount of a succession tax payable to the State, taken by the treasurer of the State to the Superior Court in New Haven County and reserved by the court, ELMER, J., upon a demurrer to the reasons of appeal, for the advice of this court. *Superior Court advised to overrule the demurrer and to modify the order of the Court of Probate.*

Owen B. Arnold, a resident of Meriden, died testate. The Court of Probate of the district of Meriden admitted his will to probate, and Charles H. Nettleton, his executor, duly qualified September 12th, 1900. His property was inventoried and valued according to law, as follows:—

Real estate	$8,900.00
Personal Property	242,738.87
Total	$251,638.87

The inventory included certain stocks, bonds and securities, valued at $75,832, which were in the possession and custody of the testator at Meridan, at the time of his death. The stocks and bonds are of corporations not domiciled in Connecticut, and organized under the

[1] Some states tax the tangible or intangible personal property situated within it belonging to a deceased non-resident. *State* v. *Dalrymple*, 70 Md. 294; *Callahan* v. *Woodbridge*, 171 Mass. 595; *Greves* v. *Shaw*, 173 Mass. 205; *In re Stanton's Estate*, 142 Mich. 491; *Dixon* v. *Russell*, 79 N. J. L. 490; *Matter of Romaine*, 127 N. Y. 80; *Matter of Clinch*, 180 N. Y. 300. Compare *Fidelity & Deposit Co.* v. *Crenshaw*, 120 Tenn. 606. But see New York, Laws (1909), c. 62, *ante*, pp. 512, 513; *Shoenberger's Estate*, 221 Pa. 112. The rule is of course the same in regard to realty within the state belonging to a deceased non-resident. *Callahan* v. *Woodbridge*, 171 Mass. 595. Compare *McCurdy* v. *McCurdy*, 197 Mass. 248. Some states have attempted by statute to avoid to some extent double taxation. Vermont, Laws (1904), No. 30, § 3; West Virginia, Acts (1904), c. 6, § 6.

laws of the United States or of other States, and include shares in the Adams Express Company, a partnership concern, or a joint-stock corporation in the nature of a partnership.

On April 3d, 1903, the Court of Probate computed the amount of succession tax payable to the State, and passed an order directing its payment by the executor.

The amount of the estate upon which the tax was computed, as set forth in the order, was ascertained as follows, to wit: by making deductions from the valuation of the property inventoried of,

Foreign assets	$75,832.00
Statutory exemption	10,000.00
Debts and expenses of administration	9,121.00
United States internal revenue tax	4,492.91
Total	$99,445.91

The item called "foreign assets" represents the inventoried value of the stocks, bonds and other securities above mentioned.

The State treasurer appealed from this order, assigning as his substantial reason of appeal that the deduction of the item called "foreign assets" is not authorized by law. The executor demurred because the item is authorized by law, and also because the law is unconstitutional.

HAMERSLEY, J. The questions presented by this reservation involve the construction of an "Act Providing for a Succession Tax," passed in 1897. Public Acts of 1897, Chap. 201. This Act was slightly amended in 1901 (Public Acts of 1901, Chap. 123), and in 1902 its first section was modified with the evident intent of expressing more clearly the purpose and meaning of the Act, and as thus amended and modified was included in the Revision of 1902, appearing in §§ 2367 to 2377.[1]

In 1889 the legislature passed an Act providing for a tax upon the transfer of property by will, inheritance, or deed, to a collateral heir or stranger to the blood of a decedent. Public Acts of 1889, Chap. 180. This Act was a condensed reproduction of an Act passed by the legislature of New York in 1885, and, in substantially the same form adopted by our legislature, was enacted by the legislature of Massachusetts in 1891. This legislation has never been before this court for construction. In New York, soon after 1885, the legislature made various alterations resulting in the specified imposition of a

[1] "The estate of every deceased person, to the amount of ten thousand dollars, and, in addition to said amount, all gifts of paintings, pictures, books, engravings, bronzes, curios, bric-a-brac, arms, and armor, and collections of articles of beauty or interest, made by will to any corporation or institution located in this state for free exhibition and preservation for public benefit, shall be exempt from payment of any succession tax; and, after deducting ten thousand dollars and all such gifts for free public exhibition, the rest of the estate of every deceased person shall be subject to the taxes in § 2368 provided." Connecticut, Gen. Stats. (1902), § 2367.

transfer tax upon the personal property found within the State belonging to nonresident decedents, as well as a tax upon the devolution of all personal property belonging to resident decedents. Somewhat similar changes were made by the legislature of Massachusetts soon after the passage of the Act of 1891.

It was after these changes were made that our Act of 1897 was passed. Our legislature repealed the Act of 1889, except as applicable to estates of persons then deceased, abandoned the policy peculiar to that Act, and substituted a new Act for giving effect to a modified policy, which it called "Providing for a Succession Tax." The new Act contains some language found in the old, but this language must be read and construed in relation to the structure, purpose, and policy of the new Act.

We think, therefore, that the true meaning of the legislation contained in §§ 2367 to 2377 can be more correctly ascertained by considering those sections as independent legislation, without speculating as to the views we might have entertained in respect to the abandoned statute of 1889, framed on different lines and for a different purpose, had that statute ever come before us for construction.

"The Act imposes an indirect tax or duty of the kind known as death duties; that is, an exaction to be paid to the State upon the occasion of death and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution." *Nettleton's Appeal*, 76 Conn. 235, 245. This duty is not a tax upon property nor upon person. The property of the decedent, as inventoried by his administrator, is valued not for the purpose of imposing a tax upon that property, but solely to furnish a basis for computing the amount of the duty to which the estate described in the Act is made subject.

The duty is not computed upon the amount of the property valued. Its amount does not depend upon the amount of that property. After the valuation of all the property inventoried, the Act contemplates a subtraction from this sum of the amount of the decedent's debts; a subtraction from this remainder of the amount of the costs and charges of administration; a subtraction from this remainder of the sum of $10,000; a subtraction from this remainder of the value of certain bequests for public benefit; and the computation of the amount of the duty upon the mathematical balance thus remaining.

The appellee claims, in substance, that the Act requires another subtraction to be made before the amount of the duty can be computed, namely, a sum equal to the total appraised value of all personal property not within the territorial limits of this State at the time of the decedent's death, which was inventoried for the purposes of administration and distribution under the laws of this State.

This depends, in the first instance, on the purpose of the legislature as expressed in the provisions of the Act laying this particular tax. There are three plans which may be followed in subjecting the estate of a deceased person to a succession tax: (1) A tax based upon the distribution of the net proceeds of a decedent's property to the persons upon whom it devolves by force of the laws of the taxing State. This plan includes in the estate subject to the tax the net proceeds of a decedent's land situate in the taxing State, and in case the decedent was domiciled in the taxing State, but not otherwise, of all his personal property. (2) A tax based upon any transfer, actual or potential, of a decedent's personal property situate at his death within the taxing State, whether the net proceeds of that property pass to the decedent's beneficiaries by force of the laws of the taxing State, or not. Under this plan the tax is more nearly akin to an ordinary transfer duty. (3) The inclusion in one Act of a tax under each of these plans.

There would seem to be no constitutional objection to the adoption of either plan. *Blackstone* v. *Miller*, 188 U. S. 189. Our succession tax is laid in pursuance of the first plan, and the Act is framed in view of the existing law of domicil in relation to this subject.

Personal property is bequeathed by will, and is descendible by inheritance, according to the law of the domicil and not by that of its *situs*. *Eidman* v. *Martinez*, 184 U. S. 578, 581. It is a settled principle of law that the disposition, distribution of, and succession to, personal property, wherever situated, is to be governed by the laws of that State where the owner had his domicil at the time of his death. *Holcomb* v. *Phelps*, 16 Conn. 127, 132. Under our law it is the duty of the administrator at the place of domicil to inventory and account for all such personal property, and that property is regarded as within the jurisdiction of the State for purposes of administration and distribution. It is true that the actual *situs* of such property in another State involves a power or jurisdiction in that State in respect to it for certain purposes, including the power through process of administration to appropriate so much as may be necessary to the satisfaction of claims of local creditors; but such administration is ancillary to that of the domicil, and the jurisdiction thus exercised is not in denial of, but in aid of, that exercised at the owner's domicil. This principle of law, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin. This principle is settled and unquestioned law within this State. *Marcy* v. *Marcy*, 32 Conn. 308, 315 *et seq.*; *Russell* v. *Hooker*, 67 id. 24, 27; *Rockwell* v. *Bradshaw*, ibid. 8. It has generally been recognized by Federal and State courts as law binding throughout the United States. It is in the exercise of this power or jurisdiction in respect to the personal property of a decedent domiciled within its limits, that the State taxes

a succession to that property notwithstanding some of it may have been at the decedent's death within the limits of another State. The legislature framed its Act in view of this law. The assertion of power over property outside its limits is limited to the purposes of succession, but to the extent of determining its descent or distribution, it claims jurisdiction of the property.

It is plain that this purpose of the legislature is expressed in the provisions of the Act. These clearly apply, primarily, and mainly, to estates of decedents domiciled in Connecticut. This is true of all our general legislation providing for administration of estates of deceased persons, from the first order of the General Court in 1639 (Col. Rec., p. 38) to the last Revision (1902), §§ 302, 303, 318. Until 1821 there was slight occasion (for reasons sufficient and of interest in connection with some of our earlier decisions, but unnecessary now to detail) to provide for appointment of administrators on estates of nonresident decedents, and in that year an Act for this purpose was passed. Statutes of 1821, p. 201. This distinction between the estates of decedents domiciled here and estates of those domiciled elsewhere, is based on substantial grounds justifying special or separate treatment, and legislation dealing generally or primarily with the former class does not apply to the latter, unless the latter is embraced within its terms or clearly falls within its equity. *Lawrence's Appeal*, 49 Conn. 411. That the Act under discussion deals generally and primarily with estates of deceased persons domiciled here, is patent from all the proceedings it authorizes and directs. The first step relates to the inventory required by the general statute (§ 323), which includes land within this State and all other property belonging to the decedent, including choses in action and personal property without the State. This general statute applies in its fullness only to estates of decedents here domiciled. Neither its requirements nor its penalties apply necessarily to all ancillary administrations, and the requirement to inventory personal property without the State cannot apply to such administrations.

The language of the Acts, however does imply that some estates of nonresident decedents, upon which ancillary administration is taken out, may be subject to the tax, and indicates these estates, namely, those consisting of lands within this State belonging to nonresident owners. Such estate is within the purpose of the Act.

Were it not for the rule of accuracy ordinarily applied to laws imposing a tax, these estates might fall within the equity of the Act, had this language not been used. For most purposes of administration and distribution, they are scarcely distinguishable from estates of domiciled decedents. But with estates consisting of personal property within this State belonging to a nonresident owner, it is different. They come neither within the letter nor the equity of the Act, but are excluded by the express terms, which subject to

a succession tax only those estates which are in the hands of an administrator for the purposes of distribution under and in pursuance of the laws of this State.

The intent of the legislature in respect to the "estate" subject to the tax, is too clearly shown in the provisions of the Act to leave room for reasonable doubt. It is the net proceeds or residuum of land within this State owned by a decedent, and of all personal property owned by one here domiciled, remaining for distribution or transfer in any form to the persons entitled thereto by force of the laws of this State, deducting therefrom the sum of $10,000 and the value of certain bequests. This, and no other, is the estate made subject to a succession tax.

The amount of a tax is measured through a percentage on the property thus devolving upon the successors, based upon a valuation previously made of all the decedent's property inventoried by the administrator. The percentage in respect to that portion of property in these estates, which passes to the decedent's immediate family, is one half of one per cent; and in respect to that portion passing to other successors, is three per cent.

In other jurisdictions it has been held that a law providing for a duty in the nature of a succession tax upon occasion or a succession to property of a decedent by his legal legatees or distributees, although general in its terms, includes, as subject to the tax, the personal property of a domiciled decedent wherever situate, and excludes, as subject to the tax, personal property of a decedent domiciled elsewhere, although situate at his death in the taxing State. *Wallace* v. *Attorney-General*, L. R. 1 Ch. App. 1; *Attorney-General* v. *Campbell*, L. R. 5 H. L. 524; *Eidman* v. *Martinez*, 184 U. S. 578; *Orcutt's Appeal*, 97 Pa. Sta. 179. This rule controls the personal property of a domiciled decedent, although the same law also imposes a tax in respect to personal property of a nonresident situate in the State. *Frothingham* v. *Shaw*, 175 Mass. 59. But our law specifically includes within its range the beneficial interest in all personal property of a domiciled decedent, and excludes the personal property of nonresident decedents within our limits.

Having ascertained, by the certain test of the provisions of the Act, its controlling purpose, the classes of deceased persons whose estates are made subject to a tax, the composition of those estates when they become subject to a tax, as well as the property from which they may be derived, the meaning of the language used in reference to this controlling purpose, and which has suggested the appellee's contention, can readily be ascertained. That language is as follows: "§ 2368. In all such estates any property within the jurisdiction of this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by the inheritance laws of this state to the parent or parents," etc., "shall be liable to a tax of one half of one per

cent. of its value for the use of the state; and any such estate or interest therein which shall so pass to collateral kindred, . . . shall be liable to a tax of three per cent. of its value for the use of the state."

The appellee contends that the words, "any property within the jurisdiction of this state . . . passing to" (the legatees or distributees of the decedent) "shall be subject to a tax of" so much per cent. on its value — separated from the context and treated as an isolated and independent phrase — impose a tax upon that property of the decedent, and on that property only, which is found at his death within the territorial limits of the State. This may be true, but it is immaterial. Such a method of exegesis is not construction of the law enacted, but the enactment of a new law.

The meaning of this section, and of all the language used, is controlled by all the provisions of the Act; and the language in question is specially and absolutely controlled by the first words of the section, in view of which alone it is used, namely, "in all such estates," that is, estates of deceased persons as defined by the provisions of the Act and made subject to a succession tax as provided. It is in reference to such estates, and to such estates only, that the language following is used.

The "property" referred to is that of which such estates consist, and no other. No property is referred to for the purpose of taxing that property. No such tax is imposed. The property of which such estates, so made subject to a succession tax, consist, is mentioned for the purpose of fixing the amount of that succession tax, as well as of controlling the stress of the tax which may fall upon the successors in relation to their nearness of kin to the decedent.

Whether the legislature used the phrase, "within the jurisdiction of this state," as indicating its jurisdiction in respect to the descent and distribution of personal property belonging to decedents domiciled in the State, or in the narrower sense of local probate jurisdiction for the purpose of appointing an administrator, or as indicating property within the State limits, it used the word "property" to indicate the whole or proportional shares of estates as made subject to the tax, and, as thus used, "property" in such estates is within the jurisdiction of the State for the purpose of regulating its descent and distribution, is within the jurisdiction of the Court of Probate whose administrator holds it for distribution, and is within the State limits.

Why the legislature phrased this Act in several particulars precisely as it did, may not be clear. It was dealing with a subject of much difficulty and novel to the legislation of this State, with great brevity and disregard of detail. It is sufficient that its intent is expressed with certainty.

The Act lays a death duty in respect to the beneficial interest, which, by force of our laws, accrues to the beneficiaries of a decedent.

The property, upon whose value the amount of the tax is computed, is that residuum of the decedent's property, inventoried under our law, remaining after claims of creditors and charges of administration have been satisfied. This property constitutes the "estates of deceased persons" referred to in the Act, and that portion of it remaining after deducting from it the sum of $10,000 and certain bequests, constitutes the estates spoken of as subject to the tax.

These estates may be derived from the land within the State belonging to any decedent, and from all the personal property of a decedent domiciled here, but cannot be derived from personal property in this State which belonged to a nonresident decedent. That property is left to the operation of any death duty that the State of the owner's domicil — which State by our law can alone control its descent and distribution — may see fit to impose. This scheme of taxation is framed upon established principles, and is adapted to avoid the peculiar difficulties and to meet with fairness and interstate obligations attending the imposition of death duties. We think it is expressed with sufficient certainty, and do not feel justified in the employment of hypercriticism for the discovery of possible defects.

This view of the legislative purpose is strengthened by an examination of the amendment passed in 1903. Public Acts of 1903, p. 42. The legislature amends § 2368 by striking out the words "by the inheritance laws of this state," and inserting in lieu thereof the words "by inheritance." Having thus removed the bar erected by the original Act, against the use of any of its provisions for imposing a transfer tax on personal property of non-residents, it proceeds to authorize such a transfer tax and to prescribe the machinery for its collection, coupling this, however, with instructions to the treasurer not to collect such transfer tax in any case where the decedent resided in a State which does not collect transfer or succession taxes from personal property therein "belonging to the estates of Connecticut decedents." The amendment recognizes the justice of the scheme adopted in the original Act, and attempts its modification only so far as may be necessary to add to the force of example the influences of reciprocity.[1]

In the present case the Court of Probate had no authority to deduct, for the purpose of computing the tax, the value of personal property inventoried by the executor and claimed to have been situate in other States at the time of the decedent's death, from the value of the estate remaining in the executor's hands for the payment of legacies and subject to the tax. It is immaterial whether the claims made as to the actual *situs* of the testator's personal property at the time of his death are correct in whole or in part.

The questions raised as to the constitutionality of the Act were disposed of in *Nettleton's Appeal,* 76 Conn. 235.

[1] But see Acts (1907), c. 179.

The Superior Court is advised to overrule the demurrer; to modify the order of the Court of Probate so that the tax shall be computed upon the value of the estate without the deduction of the sum of $75,832 made by the Court of Probate, and to affirm the order as modified.

In this opinion the other judges concurred.[1]

VANUXEM'S ESTATE.

212 Pa. 315. 1905.

Appeal by William Potter, *et al.*, executors, from decree of O. C. Montgomery Co., confirming the report of the collateral appraisement in estate of Louis C. Vanuxem, deceased. Before MITCHELL, C. J., DEAN, FELL, POTTER and ELKIN, J. J. Affirmed.

Appeal from appraisement of collateral inheritance tax.

SOLLY, P. J., filed the following opinion:

Louis C. Vanuxem, a resident of the township of Springfield, this county, died therein on December 21, 1903, unmarried and testate, leaving no lineal descendants. His will is dated October 16, 1902, and has several codicils attached. In the third item he gives general pecuniary legacies to the amount of $570,500, without deduction for taxes or like charges (which are to be paid out of the general estate), to his sisters, nieces and other relatives and persons, payments to be made to them in the order named.

In the fourth item the testator gives to his sisters, Mary and Florence, during their lives and the life of the survivor, the full and free use and occupancy as a home for themselves and any of his sisters who may become widowed, his dwelling on Evergreen avenue, Chestnut hill, and his plantation at Upatoi, Georgia, together with all household goods, furniture, horses, carriages, etc., at either place, on condition that they maintain the houses in good order, pay taxes and like charges, with the right to rent the premises for their benefit, should they not desire to occupy either. Upon the death of the survivor, the executors are directed to sell the properties, the proceeds of which shall pass into the residuary estate, which is devised and bequeathed in item five to and among certain persons and corporations, share and share alike, with the provision that in the event of the death of either of two of his brothers-in-law, in the lifetime of the testator, leaving his wife surviving, she shall be substituted as residuary legatee in place of her husband, and should both husband

[1] *Frothingham* v. *Shaw*, 175 Mass. 59; *Mann* v. *Carter*, 74 N. H. 345; *Matter of Hartman*, 70 N. J. Eq. 661; *Matter of Swift*, 137 N. Y. 77; *Short's Estate*, 16 Pa. 63; *State* v. *Bullen*, 143 Wis. 512, 520; *Thomson* v. *Advocate General*, 12 Cl. & F. 1, *accord*. *State* v. *Brevard*, Phillips Eq. 141, *contra*. Compare Estate of Weaver, 110 Iowa 328. But real estate in a foreign jurisdiction cannot be taxed at the deceased owner's domicil. *Cannell* v. *Crosby*, 210 Ill. 380; *Matter of Swift*, 137 N. Y. 77.

and wife predecease him, leaving issue surviving, such issue shall take the share of their father or mother.

By the third codicil, which is dated June 9, 1903, a pecuniary legacy of $50,000 is bequeathed to Louis Vanuxem Cochran, a nephew. The residuary clause of the will is amended and radically changed. In lieu of the devise and bequest of equal shares of the residue of the estate to the persons named in that clause, there are general pecuniary legacies of $10,000 each bequeathed to John Scott, Jr., James B. Walter and Gustav H. Seelaus, and $25,000 each to the trustees of Princeton University and the trustees of Jefferson Medical College. The interests of his sisters, Mary and Florence Vanuxem, and his brothers-in-law, William Potter, John Lewis Cochran and Daniel L. Hebard, are to remain as devised and bequeathed in the residuary clause. They are, therefore, the residuary devisees and legatees of the estate.

The language of the seventh item of the will, in part, is as follows: "I give unto my executors hereinafter named full power and discretion to sell any or all of my real estate whenever any such sale be necessary or expedient for any purpose of my estate, of administration, distribution or otherwise."

At the time of his death the testator was possessed of personalty, consisting of bonds, stocks, mortgages, notes, insurance policies, cash, etc., all of the value of about $460,000, as fixed by the appraiser of the collateral inheritance tax. His debts amounted in round figures to $140,000. The general pecuniary legacies bequeathed in the will and codicils foot up about $700,000.

He was seized in fee simple of certain real estate in Pennsylvania, Georgia, Tennessee and Illinois, a detailed statement of which, as well as the personal assets, with values, appear in the inventory and appraisement made up and filed by the collateral appraiser. Upon the real estate situated in the city of Knoxville he assessed the tax due at $1,350.13, and upon that in the city of Chicago at $6,741.82. He assessed no tax on the real estate at Upatoi, Georgia, because in his opinion it is not liable.

His action is based upon the conclusion that there is an equitable conversion of the real estate because there is not only an absolute necessity to sell the same to execute the will, but also such a blending of the real and personal estate by the testator as to show his intention to bequeath the fund arising out of the same as money. He cites a number of authorities to support the assessment of the tax on the Tennessee and Illinois lands. The executors and legatees have taken this appeal from the assessment of these lands. Their contention is that these lands pass as real estate to the legatees, there being no equitable conversion under the will.

The Act of May 6, 1887, P. L. 79, provides that all estates, real, personal and mixed of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled

within or out of this state, and all such estates situated in another state, territory or country, when the person or persons dying seized thereof shall have their domicil within this commonwealth, which passes to collaterals, shall be subject to the payment of collateral inheritance tax. The tax imposed is not a succession duty on the recipient of the property, but is a tax upon the property itself as appears from the second proviso in the third section, that it shall remain a lien on the real estate on which the same is chargeable until paid. When the legislature undertook to impose such tax upon real estate situate in another state, it transcended the power of the state: *Bittinger's Estate*, 129 Pa. 338; *Drayton's Appeal*, 61 Pa. 172; *Commonwealth* v. *Coleman's Administrator*, 52 Pa. 468. The border line, however, is reached when property which is in fact real estate is to be treated as personalty under the doctrine of equitable conversion: *Handley's Estate*, 181 Pa. 339.

Is there an equitable conversion of the lands situated in Knoxville and Chicago? If there is not, then they are not subject to the tax for the "state cannot exercise extraterritorial taxing power." If there is a conversion, then they are liable and the action of the appraiser must be sustained.

Conversion is always a question of intent. The intent of a testator is to be gathered from his entire will, rather than from the terms of a particular devise, which regarded alone might be inconsistent with the testamentary scheme as a whole: *Dean* v. *Winton*, 150 Pa. 227.

In *Hunt's* and *Lehman's Appeals*, 105 Pa. 128, Mr. Justice Paxson said: "It ought to be settled by this time that in order to work a conversion, there must be either: 1st, a positive direction to sell; or, 2d, an absolute necessity to sell in order to execute the will; or, 3d, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied." This case has been cited in the language of Justice Paxson quoted approvingly again and again by the appellate courts. Among instances are *Irwin* v. *Patchen*, 164 Pa. 51; *Sauerbier's Estate*, 202 Pa. 187; *Rauch's Estate*, 21 Pa. Superior Ct. 60.

Mr. Justice Mitchell, in the late case of *Yerkes* v. *Yerkes*, 200 Pa. 419, says: "The doctrine of equitable conversion is based on the rule that what is to be, or ought to be done, shall be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator or settler, never to defeat it. Its application requires constant watchfulness to guard against the tendency to become a formal rule de jure without regard to its real purpose and necessity. It should never be overlooked that there is no real conversion; the property remains all the time in fact, realty or personalty, as it was; but for the purpose of the will it

may be necessary, and only so far it is treated in contemplation of law as if it had been converted. Few testators have any knowledge of the doctrine, or any actual intent to change the nature of their property, except when and to the extent that may be required to carry out the special purpose of the will. The presumption, therefore, no matter what the form of words used, is always against conversion, and even where it is required, it must be kept within the limit of actual necessity."

But conversion will take place, though the language confers a more discretionary power of sale, where it is not possible to execute certain provisions of the will without a sale of the real and personal property into money. "If a testator authorizes his executors to sell his real estate and to execute and deliver to the purchasers deeds in fee simple, and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell and operate as an equitable conversion. If in addition to this clear intention of the testator, it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell": *Fahnestock* v. *Fahnestock*, 152 Pa. 56.

With these authoritative explanations of the doctrine of equitable conversion as applied in Pennsylvania, we turn to the will of the testator to ascertain his intent, and his scheme of distribution. In brief he gives general pecuniary legacies upwards of $700,000; devises certain of his real estate to two of his sisters for life, and at their death directs a sale by the executors; and devises and bequeaths the residue of his estate to his two sisters and three brothers-in-law. Whenever it is necessary or expedient for any purpose of the estate, of administration, distribution or otherwise, the executors are given full power and discretion to sell any or all the real estate. The pecuniary legacies are to be paid before those to whom the residuary is given shall receive anything, because it is only what remains of the estate, after the specific legacies are paid, that passes as residue or remainder. These legacies pass to the legatees as money. The testator intended them to be paid in cash. There is nothing in the language of the will to show they are to be paid in any other way. Their character is personalty. He must have foreseen the necessity for a sale of his real estate to carry out his scheme of dividing his estate by first bestowing gifts upon the beneficiaries, in the form of pecuniary legacies, else how were they to be paid? He, therefore, gives his executors full power to sell the real estate whenever a sale is necessary for any purpose of the estate, of administration, distribution or otherwise. It is true the power is discretionary, not direct and positive, but the intent is manifest that it is to be exer-

cised, if the purposes of distribution require it. The power is, therefore, to be construed as a direction to sell.

The last codicil to the will was executed June 9, 1903, less than seven months before testator's death. It will be observed he bequeaths $80,000 in pecuniary legacies to certain legatees who were included in the residuary clause of the will, thus giving them preference over the remaining residuary legatees. This amount, together with the legacies given in the will, made money gifts aggregating nearly $700,000, or several hundred thousand dollars more than his personal estate was then worth. The testator is presumed to have known the value of his personal estate at that time. He undoubtedly knew the extent of his gifts, and it would be passing strange if he intended their payment to be confined to the proceeds of the personal estate, resulting in each legatee receiving much less than the amount of the gift. The manifest intention of the testator is to first give legacies of different amounts, and what is left of the estate to five residuary legatees. The latter take what remains of the estate after the legacies have been first paid and satisfied thereout. "A residuary clause in a will is a gift of all that is left after the gifts specified or designated have been paid and satisfied:" Per Penrose, J., in *Wood's Estate*, 13 Pa. Dist. Rep. 195. It may be said the testator blended his real and personal estate, authorized a sale of the former by the executors, when in their discretion the purpose of distribution required it. But there can be no shadow of doubt that in order to execute the will, carry out the provisions, and pay the general pecuniary legacies, it is absolutely necessary to sell the real estate. Effect cannot be given to the will, without the exercise of the power of sale. For the purpose of administration and distribution, the proceeds of the lands must come into this court. It follows that an equitable conversion is as effectually accomplished by the will and the duties of the executors under it are the same as if it contained a positive direction to sell. In reaching this conclusion, the injunction of *Yerkes* v. *Yerkes*, 200 Pa. 419, to "keep within the limits of actual necessity," is observed.

Although the tax is assessed by the appraiser upon the value of the lands situate in foreign states, it is really upon the proceeds to be brought here for distribution. In strictness it is the legacies themselves that are subject to the tax. General pecuniary legacies pass to the legatees only in the form of money. If real estate should be conveyed to such legatees in satisfaction of their legacies, it would only be a substituted equivalent for the pecuniary sum of the legacies: *Miller* v. *Commonwealth* 111 Pa. 321.

It is immaterial to this inquiry, what the statutes of the states of Illinois and Tennessee are on the subject of collateral inheritance tax on lands within their jurisdiction owned by one dying domiciled in another state. Whether lands of this decedent situated in those states are liable to pay such tax or succession duty cannot affect

the question before us. If there is an equitable conversion of the lands into personalty under the will of the decedent, and the proceeds are brought into this court for distribution among collaterals, the legacies payable out of such proceeds are liable for the collateral inheritance.

From what has been said, it follows that the action of the appraiser must be sustained. In our view, there is such an absolute necessity to sell the lands in the states of Illinois and Tennessee and convert them into money, in order to pay general pecuniary legacies, and carry out the intent of the testator and the provisions of his will, as to work an equitable conversion into personalty, the proceeds of which sales must be brought into this court for distribution.

And now, July 21, 1904, appeal dismissed at costs of appellants.

Error assigned was the decree of the court.[1]

GARDINER ET AL., EXECUTORS *v.* CARTER, STATE TREAS.

74 N. H. 507. 1908.

PROBATE APPEAL. Transferred from the September term, 1907, of the superior court by PEASLEE, J.

BINGHAM, J. The plaintiffs are the executors, under an appointment from the probate court of Massachusetts, of the estate of Michael Anagnos, who died testate shortly before August 16, 1906, and who was at that time a resident of Massachusetts. A part of his estate consisted of shares of stock in the Boston & Maine and Fitchburg railroads, the certificates for which at the time of his decease were in Massachusetts. The plaintiffs filed a copy of the testator's will in the probate court for Hillsborough county, and petitioned for a license to receive and dispose of the stock under sections 23 and 24, chapter 189, Public Statutes. The defendant objected to the issuing of the license until a tax of five per cent of the market value of the stock at the time of the testator's death should be paid. The plaintiffs then petitioned to have the amount of the tax determined, and the probate court decreed that the stock should be assessed at its full market value, in accordance with the defendant's contention. An appeal was taken from the decree. In the hearing upon the appeal in the superior court, evidence was offered by the plaintiffs tending to prove the total value of the assets of each road, and the value of such part of the assets of each as were situated in and subject to the jurisdiction of this state; also, that the roads were engaged in the business of interstate commerce and commerce

[1] The opinion of MR. JUSTICE POTTER, briefly affirming, and the dissenting opinion of MR. CHIEF JUSTICE MITCHELL in the Supreme Court are omitted.

And see *Forbes* v. *Steven*, L. R. 10 Eq. 178; *Re Stokes*, 62 L. T. N. S. 176. *Matter of Swift* 137 N. Y. 77, 86, *contra*. Compare *Connell* v. *Crosby*, 210 Ill. 380, 390; *Hale's Estate*, 161 Pa. 181; *Estate of Handley*, 181 Pa. 339; *Shoenberger's Estate*, 221 Pa. 112; *Arbuckle's Estate*, 252 Pa. 161.

with foreign nations. The court declined to receive the evidence and affirmed the decree appealed from, and the plaintiffs excepted.

The Boston & Maine Railroad is incorporated under that name in Maine, New Hampshire, and Massachusetts, and has but a single issue of stock. It owns franchises and property in all three states, which make up the market value of its stock. The facts pertaining to the Fitchburg Railroad, as to its incorporation, ownership of franchises and property, and the issue of stock, are of the same nature and need not be stated in detail.

The plaintiffs' contention is that only such proportional part of the market value of the stock should be taxed in this state as the value of the franchises and property of the corporation here situated bears to the total value of its franchises and property, wherever situated. They do not question the jurisdiction of the probate court, under the provisions of chapter 40, Laws 1905, to impose a tax upon shares of stock in a domestic corporation owned by a non-resident decedent and passing by will or intestate succession to parties not within the exceptions mentioned in the statute, but rather concede that stock so held is property within the jurisdiction of the state, and that a tax may lawfully be imposed upon its transmission. The court in Massachusetts, in construing a statute containing provisions substantially the same as our own, has so held (*Greves* v. *Shaw*, 173 Mass. 205; *Moody* v. *Shaw*, 173 Mass. 375; *Callahan* v. *Woodbridge*, 171 Mass. 595; Mass. Laws 1891, *c.* 425), and a like holding has been made by the court of appeals in New York. *In re Bronson*, 150 N. Y. 1; *In re Palmer*, 183 N. Y. 238. The line of argument in these decisions is, that the probate court in the state where the property of the non-resident decedent is situated has jurisdiction of the settlement of the estate there located; that it may collect the assets within the state, pay the debts, make final distribution of the property, pay it over according to the will, or in its discretion cause it to be transmitted to the executor or administrator, if any, in any state or county where the deceased had his domicile, for final distribution; that the statutes imposing succession taxes contemplate that property of non-resident decedents will be administered by an executor or administrator appointed in the state where it is located; and that the right and title of a foreign executor or administrator are subject to the prior right of the state to have the property so administered as to yield the tax.

It was also decided in these cases that, as respects stock in a domestic corporation, the measure of the tax is the market value of the stock, whether all the property of the corporation is within the jurisdiction of the state or not; and it is upon this holding that the defendant relies in support of his contention, that the market value of the stock of the Boston & Maine and Fitchburg railroads should be the measure of the tax to be paid by the plaintiffs. But the plaintiffs' answer to this is, that the corporations whose stock

was under consideration in those cases were chartered only in the state where the tax was imposed; that if they were chartered elsewhere this fact was not brought to the attention of the court; and that in the more recent decisions in Massachusetts and New York, upon its being shown that the corporation was chartered in two or more states under the same name, that it had but one issue of stock, and that its property and franchises in the different states constituted the value of the stock, it was held that the measure of the tax was such proportionate part of the value of the stock as the franchises and property of the corporation within the state was of the property and franchises in the several states in which the corporation was chartered. *Kingsbury* v. *Chapin*, (Mass.) 82 N. E. Rep. 700; *In re Cooley*, 186 N. Y. 220.

It seems to us that the conclusion reached in these decisions as to the measure of the tax should be followed in this case, and that the plaintiffs' contention should be sustained. A due regard for the language of our statute, as well as justice to the taxpayer, calls for such a construction of the law. Section 1, chapter 40, Laws 1905, provides that "all property within the jurisdiction of the state, real or personal, and any interest therein, whether belonging to inhabitants of the state or not, which shall pass by will, or by the laws regulating intestate succession, . . . shall be subject to a tax of five per cent of its value, for the use of the state," etc. By its terms, the statute would seem to be limited in its operation to such property as is located in the state, or such as by reason of the domicile of the owner has its legal *situs* here (*Mann* v. *Carter*, *ante*, 345) and requires the aid of our laws for its transmission. The Boston & Maine Railroad is a domestic corporation in each of the states in which it is incorporated; and while the estate of a deceased non-resident stockholder requires the aid of the probate laws of this state to effectuate a transmission of the stockholder's right in the property of the local corporation, their aid is not required to effectuate the transmission of his right to property of the corporation in other states in which it is also chartered; and the value of the property requiring the aid of our laws for its transmission must, in such case at least, be taken as the measure of the tax called for by our statute.

It may be difficult to ascertain the exact value of the plaintiffs' right in the property of the local corporation; but if the tax is assessed upon such a percentage of the value of the stock as the amount of trackage within the state bears to the total trackage in the several states of its incorporation, the practical difficulty may be obviated, and it does not appear that the requirements of the statute would not be met.

It perhaps should be stated that since the enactment of chapter 40, Laws, 1905, petitions under section 23, chapter 189, Public Statutes, cannot be maintained by a foreign executor or administrator, if any part of his testator's or intestate's property within

the jurisdiction of the state is subject to a tax under chapter 40; that in such case it is necessary that ancillary administration be taken out by him, if he would establish and make effective his title to the property (*Knight* v. *Hollings*, 73 N. H. 495, 500; *Mann* v. *Carter*, *supra*, 350; P. S., *c.* 182, *s.* 8); that an inventory should be filed as required by section 9, chapter 40; and that these steps should be taken before application is made to the probate court under section 14, chapter 40. The plaintiff's exception is sustained.

Case discharged.

PEASLEE, J., did not sit: the others concurred.[1]

STATE, RESPONDENT *v.* PABST AND OTHERS, APPELLANTS.

139 Wis. 561. 1909.

APPEAL from a judgment of the circuit court for Milwaukee county; WARREN D. TARRANT, Circuit Judge. *Reversed.*

This appeal is from the judgment of the circuit court for Milwaukee county in favor of the state and against *Gustav Pabst*, *Frederick Pabst*, *Jr.*, *Maria Goodrich*, and *Emma Sochtlein* for $28,353.72 each. The case had been appealed from the county court to the circuit court, and the judgment rendered is for the amount of the inheritance tax found due and unpaid upon the transfer of the estate of Frederick Pabst, deceased, after making allowance for payments already made.[2]

Frederick Pabst resided in Milwaukee and died there testate on January 1, 1904. On July 17, 1903, he executed and delivered a deed of trust and conveyed to the trustees for the purposes set up in the deed 2,840 shares of stock in the Pabst Brewing Company, a corporation organized under the laws of this state. The stock of the Pabst Brewing Company was divided into 10,000 shares of the par value of $1,000 each. The trust deed was as follows:

"I, Frederick Pabst, of Milwaukee, Wisconsin, for and in consideration of love and affection, do hereby give and transfer twenty-eight hundred and forty (2,840) shares of the capital stock of the Pabst Brewing Company, a corporation, as per stock certificate No. 902, this day duly issued to my wife, Maria Pabst, and my sons, *Gustav G. Pabst* and *Frederick Pabst*, *Jr.*, in trust, subject to the limitations and terms and conditions herein stated:

"*First.* I reserve to myself the dividend which shall be earned and declared on said stock for the year 1903.

"*Second.* I reserve to myself the right to control the vote of said stock on all questions and at all elections which shall occur in said corporations during my lifetime, and hereby direct said

[1] *Kingsbury* v. *Chapin*, 196 Mass. 533; *Matter of Cooley*, 186 N. Y. 220, *accord*. See *State* v. *Metz*, 32 N. J. L. 199.

[2] The statement of facts is abbreviated.

trustees, at all such times, to vote said stock in such manner and for such parties or purpose as I shall direct. After my decease, said trustees shall vote the stock held by them under this instrument, as they or a majority of them shall determine.

"*Third.* Said trustees shall collect and receive the dividends paid on said stock from time to time. The dividend for the year 1903 is to be paid to me. All subsequent dividends are to be paid over by said trustees during my life and that of my wife, Maria Pabst, or either of us, one fourth to my son *Gustav G. Pabst*, one fourth to my daughter *Maria Goodrich*, one fourth to my son *Frederick Pabst, Jr.*, and one fourth to my daughter *Emma Soehnlein*, and their respective heirs; provided, however, that in case any of said parties shall die without leaving surviving issue, his or her share of said dividends shall be paid in equal distribution to the other of said parties or their respective heirs.

"*Fourth.* Upon the decease of both myself and my wife, Maria Pabst, the surviving trustees shall transfer one fourth of said stock to *Gustav G. Pabst*, one fourth to *Maria Goodrich*, and one fourth to *Frederick Pabst, Jr.*, or their respective heirs in case of the death of any of said parties. In case my said daughter, *Emma Soehnlein*, shall, at such time, have a child or children living, such child or the oldest of such children being not less than ten years of age, then the remaining one fourth of said stock shall be transferred to said *Emma Soehnlein*, if she be then living, and said trust shall thereupon cease. If at such time said *Emma Soehnlein* shall have no living issue, or her issue shall not have attained the aforesaid age, said trust shall continue as to one fourth of said stock, and the dividends thereof shall be paid to said *Emma Soehnlein* during her life, provided, that if she have a child or children and the same or any of them attain the age of ten years, she being living, said stock shall then be transferred to her and the trust cease. In case of the death of said *Emma Soehnlein* during the continuance of said trust, leaving issue surviving her, such issue shall receive said dividends during life and said stock shall be transferred to such issue upon the arrival of the oldest thereof at the age of twenty-one years. In case of the death of said *Emma Soehnlein* without issue surviving her, or the subsequent decease of such all issue prior to the transfer of said stock, pursuant to the provisions herein contained, the same shall be transferred to my other children herein named, or their respective heirs by representation. The book value of said stock is four million dollars, and this transfer is intended, subject to the limitations stated, as a gift of one million dollars to each of my said children.

"Done at the city of Milwaukee, this 17th day of July, 1903.

[Signed] Fred Pabst.

"In the presence of

"F. C. Winkler.

"C. W. Henning."

On the day the trust deed was executed the deceased surrendered to the Pabst Brewing Company certificates for 2,840 shares of its stock and caused new certificates for the same number of shares to be issued to the trustees named in the deed. On the same day he also made and executed his last will and testament, disposing of all the rest of his property. . . .

The will was admitted to probate February 3, 1904, and on the same day the appraisers in the probate proceedings were appointed and letters testamentary issued to the executors named in the will. About May 20, 1904, the appraisers were furnished with an inventory of the estate by the executors, and on December 31, 1904, they completed their appraisal and made their report valuing the estate at $2,734,475. The executors, under the advice and as directed by their counsel, computed the inheritance tax upon the transfer of property under the will on this appraisal at $58,714.72, after deducting the five per cent. discount allowed for payment within one year from the testator's death, and on the same day paid this sum to the treasurer of Milwaukee county, upon condition that they would have a right to demand restitution if the tax should be found invalid. December 13, 1905, the secretary of state petitioned for a re-appraisal of the estate, and on the following 27th day of September a supplemental inventory was filed, whereby omitted items of the property of the estate, amounting to $180,833, as found by the court, were added to the value of the estate. On October 3, 1906, Maria Pabst the widow of the testator, died. Letters of administration upon her estate were issued to the Wisconsin Trust Company of Milwaukee, and this company was also named in her stead as one of the executors of the will and as a trustee under the trust deed of Frederick Pabst, deceased. The executors in making their estimate of the value of the estate for payment of the inheritance tax omitted some property belonging to the estate which passed under the will, but this was afterward added. They listed the stock of the brewing company which belonged to the estate at its par value and took no account of the stock transferred by the deed of trust. . . .

As bearing on the question of whether or not the trust deed had been executed in contemplation of death, there was evidence that the deceased had suffered from diabetes for fifteen years, that he had watched the progress of the disease during that whole period, and that frequent urinalyses kept him informed of his physical condition and the state of the malady. He was frequently examined by physicians and had them in almost constant attendance and on their advice dieted and went to various health resorts in Europe and this country seeking relief. In the early part of the year 1903, in the hope of restoring his impaired health or at least of checking the decline of his strength, he went to the milder climate of southern California. While there he was very seriously ill and his son was sent for. Early in the summer he came home to Milwaukee accompanied by this son

and his wife. After his return his declining vitality necessitated that his physicians frequently consult together on his case. On July 17, 1903, while in this physical condition, he executed the deed of trust and his will. Later in the year his condition became so serious that the leading specialist in the country on the disease from which he suffered was called by his family. Generally speaking, he was of a cheerful, optimistic disposition, loving to his family and friends, and, although probably better informed concerning his serious condition than any but a professional man or specialist, was cheerful and encouraging, although he told some of his attendants that he required their assistance to prolong his life. For some time his sons had had the active management of his business with his constant advice and participation with a view to acquaint them with the business and to prepare them to manage the large interests of the family without his assistance.

The court found that the testator died January 1, 1904; that he left surviving him certain heirs, the facts as to the probate of the will, the death of the widow, and the substitution of the Wisconsin Trust Company as executor in her place; that the deceased had been afflicted for about fifteen years with diabetes; that he knew during the last year of his life that he could not recover from the diabetes and the intercurrent diseases from which he suffered; that he therefore executed the trust deed in contemplation of death; that it was intended to take full effect only upon his death; and that the deceased reserved to himself for a period the dividends of the stock thus conveyed by him and retained the right to vote and control the stock during his lifetime. An inventory of the estate as disposed of by the trust deed and by the will is among the findings, and the amount of the debts, funeral expenses, and expenses of administration to be deducted from the value of the estate before computing the inheritance tax is found to be $212,247.55.

As conclusions of law the court found that the property transferred by the deed of trust was so transferred in contemplation of death and was intended to take effect at the time of death of the donor; that the tax upon the property transferred by the deed and by the will accrued January 1, 1904, the time of the death of the donor; that there should be imposed a penalty of ten per cent. per annum of the amount of the tax due and unpaid, computed from the date of the death of the deceased to the time of appeal from the judgment of the county court; that interest at the rate of six per cent. should be allowed upon the amount due for taxes after the date of the appeal; that the county court of Milwaukee county was the proper tribunal to fix and determine and to apportion the amount of the inheritance tax to be paid by the estate or the beneficiaries of the trust deed and the will; and that there was due as such tax from *Gustav Pabst*, *Frederick Pabst, Jr.*, *Maria Goodrich*, and *Emma Soehnlein*, each, the sum of $28,328.72.

This is an appeal from the judgment entered on the findings.

SIEBECKER, J.[1] . . . It is contended that the court erred in holding that the deed of gift was a transfer in contemplation of death by the donor. The statute imposes a tax upon the transfer of property by deed or gift, "made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." Subd. 3, sec. 1. The meaning of the words "in contemplation of death," as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty. This accords with the general objects and purposes of the law, namely, the imposition of a tax on the devolution of property involved in the demise of the owner. The supreme court of Illinois in *Rosenthal* v. *People*, 211 Ill. 306, 309, 71 N. E. 1123, interpreted these words in such a tax law as follows:

"A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute."

The claim that the words can include only gifts *causa mortis* attributes to them too restricted a meaning. A transfer valid as a gift *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law.

In the case of *Estate of Merrifield* v. *People*, 212 Ill. 400, 405, 72 N. E. 447, in speaking on this subject, the court says:

"It is said, however, by appellants that a transfer of property made without consideration, in contemplation of death, is a gift *causa mortis*, and that the stipulation is that the gift was absolute. Hence it could not be a gift *causa mortis*, as a gift *causa mortis* is conditioned upon the death of the donor. A gift *causa mortis*, strictly speaking, applies only to personal property, and the gift is defeated if the donor recovers. In this case the subject matter of the transfers was both real and personal property and the transfers

[1] Portions of the opinion are omitted.

were absolute, and not upon the condition that they should be revocable in case of the recovery of the donor. They were, however, made in contemplation of his death. They fall, therefore, more nearly within the description gifts *inter vivos* made in contemplation of death than within the designation gifts *causa mortis*." *In re Estate of Benton*, 234 Ill. 366, 84 N. E. 1026.

Though there is some divergence of view in the earlier cases in New York in their interpretation of these words, the view expressed in the Illinois cases was adopted in the recent decision of *Matter of Palmer*, 117 App. Div. 360, 102 N. Y. Supp. 236, as the proper one under the law as it then stood, which is substantially the same as the law of this state.

The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests a purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it the characteristics of a devolution made at the time of the donor's death. It is strenuously contended that the trial court's finding of fact that the deceased's execution of the deed of trust, transferring the brewing company's stock to his four children, was made in contemplation of death within this law, is not sustained by the evidence. The evidence on this issue is voluminous and so far as necessary has been incorporated in the statement of the case.

It is urged that the trial court was misled in its conclusion of fact on this issue through the error of receiving the death certificate in evidence. The claim is that the statute prohibiting decedent's attending physician from testifying to any fact concerning decedent's condition of which he had acquired knowledge in his professional capacity, and which it was necessary for him as a physician to know in order to properly prescribe for him, is a ground for the exclusion of the certificate as evidence. We discover no force in this claim. Physicians are required by secs. 1024 and 1024*a*, Stats. (1898), to make the death certificate. This is made a public record. Its contents are published to the world and are no longer treated as privileged. Was the certificate properly received as evidence of its contents? Sec. 4160, Stats. (1898), provides that when the records specified in this section are produced by the proper custodian and are supported by the oath of the person in lawful charge thereof that the record is what it purports to be and is genuine, it "may be admitted as *prima facie* evidence" of its material contents. The amendment of 1898 to the section contemplates that the records of a physician, which are included in the section, should be received as evidence. We are of opinion that the death certificate is included in this section and was properly admitted as *prima facie* evidence of the material facts stated therein. In case of *Rohloff* v. *Aid*

Asso., 130 Wis. 61, 109 N. W. 989, a ruling excluding as original evidence a certificate of death made by a health officer was upheld. This ruling was evidently upon the ground that the amendment does not include the records of health officers.

The evidentiary facts relied on to show decedent's physical condition at the time of making the deed of gift and the will are in many respects uncontroverted. It is without dispute that he had had diabetes for many years, that he was fully informed of the state of his health during the period of his affliction, that he made a number of trips to parts of this and to foreign countries to build up his health, and that he received constant treatment from his physician to retard the progress of the disease. In the early part of the year 1903 his strength and health had become so impaired that his physicians advised him to pass the winter and the ensuing spring season in California. While upon this trip he had serious attacks of illness, one of which seriously imperiled his life. After his return to Milwaukee and during the early summer of 1903 he was under constant treatment, but showed signs of declining vitality to such a degree that consultations of physicians were held concerning his condition. No evidence indicative of improvement was then discovered, and complications became manifest during the summer and autumn of 1903. True, there is conflict in the evidence of the experts called into the case and in the evidence of his physicians, the members of his family, and of others who observed him throughout his illness; but an attentive reading and examination of the evidence persuades us that the decedent, by reason of his apprehension of impending death, was led to make the deed of gift to transfer part of his estate to those whom he desired should have and enjoy it after his death.

Much stress is laid on decedent's declaration in the year 1900, while he was abroad for recuperation and rest, that in recognition of the valuable aid of his sons in building up his estate he intended, upon his return home, to dispose of part of his estate to his children. It is significant that he did not then do so or in the immediately succeeding years. He took no such steps until he had undergone the serious illness of 1903, which naturally admonished him of his rapid decline in strength and health. Considering his condition, the execution of the deed of gift and the will simultaneously indicates that he was disposing of his property to those whom he regarded as the natural objects of his bounty, rather than that he was transferring it to them as compensation for worthy and valuable services rendered by them in its accumulation. He knew his condition and was aware of the outcome to be inferred from his symptoms. After his return to Milwaukee he conferred with his attorneys and made the deed of gift and his will. These instruments were made and executed at the same time as one transaction. The evidence, in our opinion, abundantly sustains the trial court's conclusion that the deed of gift was made in contemplation of death. . . .

The result of these considerations is that the trial court's findings and conclusions are approved in all matters except as to the imposition of the ten per cent. interest charge on the amounts found due from the appellants. The error committed in rendering a judgment including such interest requires reversal of the judgment. The cause must be remanded to the trial court for judgment on the findings as approved by this court. All the findings of the circuit court are approved on this appeal except the one finding ten per cent. interest due from January 1, 1904, to March 1, 1907.

BY THE COURT. — Judgment reversed, and the cause remanded to the trial court for judgment on the findings as made by the trial court and approved by this court in accordance with this opinion.

TIMLIN, J., dissents.[1]

NEW ENGLAND TRUST COMPANY *v.* ABBOTT.

ATTORNEY GENERAL *v.* NEW ENGLAND TRUST COMPANY.

205 Mass. 279. 1910.

BILL IN EQUITY, filed on October 30, 1909, by the trustee under written agreements of trust which are described in the opinion, for instructions as to whether or not an inheritance tax should be paid upon a fund in its possession under the agreements; and

Information, filed on the same day by the Attorney General at the relation of the treasurer and receiver general, seeking that the trustee be ordered to pay the inheritance tax to the treasurer and receiver general.

The two cases were ordered to be heard together, and were reserved by HAMMOND, J., upon the bills and answers for determination by the full court. The facts are stated in the opinion.

The cases were submitted on briefs.

KNOWLTON, C. J. These two cases present but a single question. On or about December 23, 1893, and on each of three days thereafter, one James C. Marshall, who died in January, 1907, domiciled in Boston, deposited with the New England Trust Company the sum of $1,000, making $4,000 in all, upon conditions set forth in certain agreements of trust. Under these agreements, which were all alike in their substantive provisions, the Trust Company was to pay the income as often as dividends thereon should become payable, to Harriet E. Abbott or her order. At the expiration of five years from the date of the agreement, Marshall could withdraw the whole trust fund by giving the company written notice of his intention so

[1] On what transfers are "in contemplation of the death of the grantor," see *Rosenthal* v. *The People*, 211 Ill. 306; *Merrifield* v. *The People*, 212 Ill. 400; *People* v. *Kelley*, 218 Ill. 509; *Matter of Spaulding*, 163 N. Y. 607, affirming 63 N. Y. Supp. 694; *Matter of Baker*, 178 N. Y. 575, affirming 77 N. Y. Supp. 170.

to do six months before that time, and the company could pay off the trust fund if it chose, by giving him a like notice of its intention so to do. If no such notice was given by either party, the trust fund was to remain during another term of five years, and the right of withdrawing or paying off the principal sum might be exercised at intervals of five years from the date of the agreement. In case of the death of Marshall before the termination of the trust, or of any agreed extension thereof, the trust fund and any unpaid income was to become payable to Harriet E. Abbott in sixty days after the expiration of the period of five years, or any agreed extension thereof. The fund has remained in the possession of the Trust Company, Marshall has deceased, and the question is whether the Trust Company, before paying the principal to Miss Abbott, is to deduct from it any sum for a collateral inheritance tax under the provisions of the R. L., c. 15, Sec. 1, as amended by the Sts. 1905, c. 470 and 1906, c. 436, and if so, what sum.

The only part of the property which was finally disposed of in a known and definitely stated way was the income for the period of five years. The disposition of the principal was left subject to contingencies, any one of three of which might terminate the trust and give direction to the payment of the principal. The creator of the trust, six months before the expiration of the five years, could give notice of his intention to withdraw the principal, or the Trust Company could give notice of its intention to pay it off, in either of which cases the money would be returned to Marshall; or, if Marshall survived and no notice was given, another period of five years would begin under the same arrangement; or if Marshall died before the expiration of the first period and no notice had been given, the trust would be terminated and the principal paid off to Miss Abbott at the end of sixty days from the expiration of the period.

She had a vested interest in the income until the termination of the trust. The arrangement in regard to the principal was very different. Her only interest in that was contingent, and she was not to enter into the possession and enjoyment of it, in any event, until after the death of Marshall, and then only if the trust had not been terminated by either party by giving notice in his lifetime.

The question under the statute is whether this gift of the property was "made or intended to take effect in possession or enjoyment after the death of the grantor." We think it plain that it was. Miss Abbott could have no possession or enjoyment of the principal until after his death. The fact that she had the possession and enjoyment of the income in his lifetime makes no difference. In that respect the case is the same as if this income had been given to another person, with the disposition of the principal that appears in the agreement. The income and principal stood each by itself, with a separate provision for the disposition of each, and they were as independent of each other as if the income had been given to a

third person. The cases are within the principal on which *Crocker* v. *Shaw*, 174 Mass. 266, was decided, and similar decisions under similar statutes have been made in other States. *People* v. *Kelley*, 218 Ill. 509. *Matter of Green*, 153 N. Y. 223. *Matter of Bostwick*, 160 N. Y. 489. *Matter of Brandreth*, 169 N. Y. 437. *Wright's Appeal*, 38 Penn. St. 507. *Reish* v. *Commonwealth*, 106 Penn. St. 521. *Seibert's Appeal*, 110 Penn. St. 329. *Dubois's Appeal*, 121 Penn. St. 328. *Line's Estate*, 155 Penn. St. 378.

The property is subject to a collateral inheritance tax, to be assessed as of a time thirty days after the expiration of the period of five years referred to in the agreement, and interest is to be paid upon the tax from that time. In the bill of the New England Trust Company the plaintiff is to be instructed accordingly. In the information by the Attorney General the defendant is to be ordered to make payment of the tax and interest to the treasurer and receiver general.

So ordered.[1]

IN RE ESTATE OF GRAVES.

242 Ill. 212. 1909.

APPEAL from the County Court of Cook county; the Hon. LEWIS RINAKER, Judge, presiding.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal by the executors of the will of Henry Graves, deceased, from a judgment of the county court of Cook county fixing the amount of inheritance tax payable by them.

Henry Graves died testate October 3, 1907, leaving as his only heir a grand-niece, Louise DeKoven Bowen, who was not mentioned in his will. She threatened to contest the validity of the will, and thereupon all the residuary legatees agreed among themselves that two of their number, Henry Graves and John C. Neely, who were named in the will as executors, should pay to her $50,000 out of the assets of the estate to withdraw her opposition to the will and relinquish her claim to the estate. Afterward Mrs. Bowen entered into an agreement with Graves and Neely to accept the $50,000 and withdraw her opposition to the will. Accordingly the will was admitted to probate. Graves and Neely qualified as executors and paid Mrs. Bowen $50,000 out of the assets of the estate, and Mrs. Bowen transferred to them all her interest in the estate and covenanted not to begin any proceedings to interfere with said will or their execution thereof.

The cause was submitted to the county court upon an agreed case made under section 103 of the Practice act. Among the points

[1] And see *People* v. *Kelley*, 218 Ill. 509; *Crocker* v. *Shaw*, 174 Mass. 266; *Douglas County* v. *Kountze*, 84 Neb. 506; *Matter of Green*, 153 N. Y. 223; *Appeal of Seibert*, 110 Pa. 329; *Line's Estate*, 155 Pa. 378.

of law was the question whether the sum of $50,000 paid to Mrs. Bowen was taxable as going to her or as going to the residuary legatees. The court held that it was taxable as going to the residuary legatees and fixed the amount of the tax. The only question presented on this appeal is whether this sum was taxable to the residuary legatees.

The descent of property in this State, whether by inheritance or devise, is regulated entirely by statutory provisions. (*Kochersperger* v. *Drake*, 167 Ill. 122.) All the property owned by any person at his decease passes either under the Statute of Descent, to the persons mentioned in that statute, or under the Statute of Wills, to his devisees. In either event it passes subject to the indebtedness of the decedent and the expenses of administration, and to no other charges. The Inheritance Tax law provides that all property so descending, whether under the Statute of Wills or the Statute of Descent, shall be subject to a tax at certain specified rates at the fair market value thereof, which shall be due at the death of the decedent. The tax is not upon the estate of the decedent but upon the right of succession, and it accrues at the same time the estate vests, — that is, upon the death of the decedent. Questions may arise as to the persons in whom the title vests, and such questions may affect the amount of the tax and the person whose estate shall be chargeable with it; but when those questions are finally determined their determination relates to the time of the decedent's death. No changes of title, transfers or agreements of those who succeed to the estate, among themselves or with strangers, can affect the tax. All questions concerning it must be determined as of the date of the decedent's death.

It is insisted that the value of the residuary estate is diminished by the adverse claim of the contesting heir, and that the payment of $50,000 made in good faith upon reasonable grounds for the settlement of such claim should therefore be deducted in fixing the value of the estate. The statute requires all the property of the estate to be appraised at its fair market value. The value of the estate which passes is the value so ascertained less the indebtedness of the decedent and the expenses of administration. Whatever litigation may occur between those who succeed to the estate as to their respective rights, or between different claimants of interests, cannot affect such value. The fair market value so ascertained is the basis upon which the amount of the tax must be fixed. Unjust claims may be made against those succeeding to the estate and they may be put to great expense in defending their property, but the value of the property or of their respective interests in the property is not thereby affected.

The case of *Connell* v. *Crosby*, 210 Ill. 380, is cited to sustain the deduction of the $50,000 payment. The $12,363.65 deducted in that suit was for lawful expenses incurred by the executors in successfully defending a suit brought to contest the will. Such expenses are

a part of the expenses of administration. Executors have no authority to make a payment of the character of that made in this case. The payment was made by virtue of the agreement among the residuary legatees and was no part of the expenses of administration.

It is argued that the amount paid in compromise of the threatened litigation diminished the value of the estate as much as if it had been paid in attorneys' fees. While the result to the residuary legatees may have been the same, the amount of the beneficial interest which passed to them under the will was not affected by the fact that they used a portion of the amount which did so pass in the defense against or settlement of an assault upon their title. Moneys lawfully paid by the executors in such defense stand on a different footing, because the beneficial interest which passes under a will is only what remains after the payment of the indebtedness of the estate and expenses of administration.

It is argued that the heir received the sum of $50,000 as the value of her interest in the estate by virtue of the fact that she was heir, and that it therefore passed by descent. In fact, however, she received nothing as heir. She received nothing from the estate. No beneficial interest passed to her under any statute. The money was paid to her by virtue of a contract with the heirs. Henry Graves died testate. His will disposed of all his estate. The whole of the residuary estate vested, at the instant of his death, in the residuary legatees. The inheritance tax was then due and payable. The beneficial interest in the property then passed to the legatees and their succession gave rise to the tax. Subsequent events did not affect it. *In re Cooke*, 187 N. Y. 253. The contrary view is held by the Supreme Court of Pennsylvania in *Pepper's Estate*, 159 Pa. St. 508, and *Kerr's Estate*, id. 512, but we cannot assent to the reasoning or the conclusion in those cases.

The judgment of the county court is affirmed.

Judgment affirmed.[1]

ATTORNEY GENERAL *v.* CLARK, EXECUTRIX.

222 Mass. 291. 1915.

CROSBY, J. This is an information in equity brought in the Supreme Judicial Court at the relation of the Treasurer and Receiver General under St. 1909, c. 490, Part IV, as amended by St. 1912, c, 678, Sec. 1, to recover a succession tax. The case comes before us on a reservation made by a single justice, PIERCE, J., which contains the agreed facts and certain stipulations made by the parties.

[1] *Baxter* v. *Treasurer and Receiver General*, 209 Mass. 459; *Matter of Cook*, 187 N. Y. 253, *accord*. But see *Pepper's Estate*, 159 Pa. 508; *Kerr's Estate*, 159 Pa. 512; *Hawley's Estate*, 214 Pa. 525; *English* v. *Crenshaw*, 120 Tenn. 531. Compare *Matter of Wells*, 142 Iowa 255; *Matter of Westurn*, 152 N. Y. 93.

The record shows the following facts: That Elizabeth M. Clark, the deceased, and Mary M. Clark, the defendant, were sisters living together in Waltham in this Commonwealth on the real estate hereinafter referred to; that these sisters, being tenants in common of the real estate so occupied by them, obtained title thereto by inheritance, and also by deed from a third heir; that on November 11, 1907, they conveyed the real estate to a third person, and on the same day their grantee re-conveyed the estate to them as joint tenants; that at different times since November 11, 1907, these sisters purchased with funds, of which each of them contributed one half, certain securities consisting of stocks and bonds which were all issued to them as joint tenants. These securities were kept in their joint possession until the death of Elizabeth, since which time such possession has continued in Mary, the survivor. It is also agreed that on or about January 2, 1908, these sisters opened two accounts in the Springfield Institution for Savings, one in the name of "Either Elizabeth M. Clark or Mary M. Clark, or the survivor of either," and the other in the name of "Either Mary M. Clark or Elizabeth M. Clark or the survivor of either." Each of them contributed one half of the total amounts so deposited, and there were no withdrawals "unless for their joint benefit. The total balance of these two deposits on September 10, 1912, the date of the death of Elizabeth M. Clark, was $1,623.56. The value of the real estate, securities and deposits having been agreed upon by the parties, it is the contention of the Attorney General that one half of the total amount of such value became taxable upon the decease of Elizabeth M. Clark, one of the joint owners.

1. There can be no doubt that, after the transfer of the real estate and the issuance of the securities to these sisters in the manner above described, they thereafter held and owned such real and personal estate as joint tenants with all the incidents which govern such a tenure, including that of survivorship; and we think that the same is true as to the deposits in the savings bank. The words of survivorship, employed when the deposits were made and thereafter were held by the bank, were apt and sufficient to create a joint tenancy, and such obviously was the intention of the parties, especially when considered in connection with the estate in joint tenancy created by them in the real estate and the securities. The record shows that no withdrawals were made unless for their joint benefit, and it fairly may be inferred from all the facts and attendant circumstances that it was agreed between the sisters that neither of them should withdraw any of the deposits except upon their joint account and for their mutual use and benefit. Nor is this conclusion affected by the fact that either might have withdrawn the deposits contrary to such an agreement and thereby have destroyed the joint tenancy. A joint tenant, as an incident of his tenure, always may terminate the joint tenancy by transfer or conveyance of his interest. A joint

tenancy is not confined to real estate, but may exist also in personal property. *Phelps* v. *Simons,* 159 Mass. 415. *Boland* v. *McKowen,* 189 Mass. 563.

2. The record shows that these two sisters intended to create an estate in joint tenancy both as to the real and the personal estate. They were equal owners in the real estate when their holdings therein were changed from that of tenants in common to joint tenants; so, too, each contributed one half of the purchase price of the securities and one half of the amounts deposited in the savings bank. When they created an estate in joint tenancy in the real estate and personal property above referred to, a contract was made between them for a valuable consideration, and in the absence of fraud or anything to indicate that it was not entered into in good faith, it constituted a valid agreement and must be recognized as such. There is no evidence of fraud or bad faith in creating the joint tenancy. It cannot be found that there was a gift of one half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statute because the joint tenancy was not severed during the lifetime of the tenants. Each sister contributed an equal amount for her interest in the real and personal property when the joint tenancy was created, and there is nothing to show that the right of survivorship was not as valuable to one as to the other. Each held subject to the limitations which such a tenure imposed upon them, and thereafter they held by but one title.

We are of opinion that the contract between the parties creating a joint tenancy in the property in question cannot be held under the circumstances to be a voluntary gift without consideration and so liable to a succession tax.

3. The only question remaining is whether an interest in property which, upon the death of one joint tenant passes by right of survivorship to his co-tenant, so passes "by the laws regulating intestate succession" within the meaning of the statute. St. 1909, c. 490, Part IV, Sec. 1. In ascertaining the intent of the Legislature in construing this statute, the established rules of construction are to be applied.

In *Martin L. Hall Co.* v. *Commonwealth,* 215 Mass. 326, 329, it was said: "Tax laws are strictly construed. If the right to tax is not plainly conferred by the statute it is not to be extended by implication." The statute under consideration authorizes the imposition of an excise tax. It is so imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of the beneficiary to receive such property. *Attorney General* v. *Stone,* 209 Mass. 186, 190. *Minot* v. *Winthrop,* 162 Mass. 113, 122, 124. The statute does not in express terms authorize the taxation of the interest accruing to a surviving tenant upon the termination of a joint tenancy by the death of his co-tenant. In England such interests are expressly made taxable by statute. St. 57 & 58 Vict. c. 30, Sec. 2

(d). The words "intestate succession" are to be construed in accordance with their ordinary legal interpretation. We are of opinion that, as used in this statue, these words have the ordinary significance as applied to the subject matter, and mean succession by the laws regulating the descent and distribution of intestate property. Intestate succession, we think, applies to cases where persons die intestate or leave no valid will, thereby requiring the descent and distribution of their estates in accordance with laws providing therefor. The word "succession" in its ordinary legal use has been described as "the devolution of title to property under the laws of descent and distribution." *State* v. *Payne*, 128 Mo. 468.

The descent and distribution of estates is regulated by statutes enacted from time to time and amended whenever deemed expedient. We think that the "laws" regulating intestate succession mean the statute laws relating to the descent and distribution of intestate estates, and do not include the succession of property which passes under the rules of the common law. Joint tenancy arises under the common law, and the doctrine of survivorship thereunder grows out of the application of common law principles wholly independent of statute. Joint tenants hold under the conveyance or instrument by which the tenancy is created. See *In re Headen's estate*, 52 Cal. 294; *Adams* v. *Akerlund*, 168 Ill. 532; *Matter of Klatzl*, 216 N. Y. 83. See also *Palmer* v. *Treasurer & Receiver General*, *ante*, 263.

Mary M. Clark and her sister Elizabeth as joint tenants held under a tenure which would give the survivor the whole if there was no alienation thereof by either party. Upon the death of Elizabeth, Mary, as her survivor, took the whole estate, not by descent as the heir at law of her sister or under the laws regulating intestate succession, but as the sole surviving joint tenant.

In accordance with the stipulation of the parties, let the entry be

Information dismissed with costs.[1]

BLAIR *v.* HEROLD.

150 Fed. Rep. 199. 1907.

Cross, District Judge. The above case was tried before the court without a jury; a jury having been waived pursuant to the statute. The attorneys of the respective parties have agreed upon a statement of facts in the nature of a special verdict, to be filed in the case, so that I am absolved from the duty of finding them. The action is

[1] But now compare Acts (1916), c. 268, § 1, *ante*, p. 508. See United States, 39 Stat., p. 777, § 202, *ante*, p. 504; *McDougal* v. *Boyd*, 159 Pac. (Cal.) 168; Illinois, Laws (1909), p. 316, § 9; *National Safe Deposit Co.* v. *Stead*, 250 Illinois 581; New York, Laws (1915), c. 664, § 220, subd. 7, *ante*, p. 513. As to estates by entireties, see *Palmer* v. *Treasurer*, 222 Mass. 263. As to inheritance tax on community property, see *Matter of Moffitt*, 153 Cal. 359; *Matter of Sims*, 153 Cal. 365; *Succession of Marsal*, 118 La. 212.

brought to recover certain taxes paid by the plaintiff as executor, levied pursuant to section 29 of an act entitled, "An act to provide ways and means to meet war expenditures and for other purposes," passed June 13, 1898 (30 Stat. 488, c. 448 [U. S. Comp. St. 1901, p. 2286]), the important part of which section in this connection is as follows:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid, shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will, or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty tax, to be paid to the United States, as follows — that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be," etc.

John I. Blair, late of Blairstown, Warren county, N. J., died December 2, 1899, leaving a last will and testament, which was duly proved before the surrogate of said county, and letters testamentary were issued thereon to the plaintiff, De Witt Clinton Blair, on the 28th day of December aforesaid, who thereupon took upon himself the burden of administering the estate of said decedent. By a clause of said will the residuary estate of the testator was devised to his son, said De Witt Clinton Blair. On the 18th day of April, 1890, the decedent John I. Blair, said De Witt Clinton Blair, and three other persons, entered into a close partnership agreement to conduct a general banking business under the name of Blair & Co., in the city of New York. The partnership was to be continued for 10 years, and for such further period as might be mutually agreed upon by the parties. It was also provided that the death of one or more of said partners, so long as three members of the firm survived, should not work a dissolution of the copartnership. The more pertinent items of the partnership agreement to the question presented for consideration are following:

"VIII. It is hereby mutually agreed, that in consideration of mutual stipulations of these articles, and for the further consideration of one hundred dollars ($100) paid by De Witt C. Blair (the receipt whereof is hereby acknowledged by said John I. Blair), and the love and affection borne by the said John I. Blair, to his son, the said De Witt C. Blair, and for divers other good and valuable considerations received by said John I. Blair from the

other parties to this agreement, that upon the death of the said John I. Blair, should the same happen during the period herein or hereafter agreed for the continuance of said co-partnership, all of the rights, title, share, equities and demands whatsoever, then theretofore owned and remaining, or then held, or claimed by the said John I. Blair in the said capital, or any increase or profits thereon, or of, in or to any of these assets or rights of said firm, shall, upon such death, become transferred to, vested in, and owned by the said De Witt C. Blair, absolutely, as his property.

"IX. In consideration of the premises, it is further agreed by all the parties hereto that, upon the happening of the continency provided for in article VIII above, the said share, rights and property so accruing to the said De Witt C. Blair, from the said John I. Blair, at the latter's death, shall continue and be retained in the said co-partnership business during the term or terms of its continuance herein or hereinafter agreed upon between the said parties. And the said DeWitt C. Blair shall succeed to all of the benefits, rights and relations under such accruing right, title and share in the same manner as said John I. Blair would have been entitled to, if living, said De Witt C. Blair, taking the place of his said father."

The total value of the interest of said John I. Blair in the copartnership at the time of his death, including surplus and undivided profits, was $1,321,332, upon which sum a tax was levied under said act at the rate of $2.25 for every $100, aggregating $29,729.97. This amount was paid by the plaintiff under protest July 2, 1906, and its recovery, with interest, is sought by this suit. It will be noticed that the partnership agreement was entered into eight years before the passage of the war revenue act. Consequently no claim can be made that it involved any intention to evade the provisions of that act. . . .

The theory upon which the government proceeded in assessing this tax must of necessity have been that the plaintiff was a person "having in charge or trust * * * as executor * * * personal property or an interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. On the part of the plaintiff it is claimed, among other things, that De Witt Clinton Blair never had in his hands, as executor, any interest in this copartnership which John I. Blair had up to the time of his death, and that such interest was not transferred, to use the language of the statute, "by deed, grant, bargain, sale, or gift," because these words all refer to transfers made without consideration, and are therefore inapplicable to the transaction in question. It consequently becomes important at the very outset of this inquiry to determine the meaning of the words, "transferred by deed, grant, bargain, sale or gift." So far as I am informed, they have never received any direct construction by the Supreme Court, or

other of the federal courts. They have, however, been construed, and their meaning determined by the courts of several of the states. In *Hagerty* v. *State*, 55 Ohio St. 613, 45 N. E. 1046, it was argued that the following language of the Ohio act: "That all property * * * which shall pass * * * by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor" — rendered the law of 1894, in which it was found, unconstitutional, because it applied to sales in the ordinary course of business, for valuable consideration, and thereby restrained the owner's guarantied right freely to sell and convey his property. In reply to this argument the court said:

"It is further objected that the act is invalid because the provision that all property 'which shall pass by will * * * sale or gift' shall be subject to the imposition invades the owner's guarantied right to sell and convey property, which right is embraced within its enjoyment. But the meaning of the word 'sale,' as used in the statute, is to be determined by the maxim, '*Noscitur a sociis*,' and it includes only transactions which in form sales are, in fact, gifts."

[The learned judge then quoted from the following cases: *Matter of Birdsall*, 49 N. Y. Supp. 450; *Matter of Miller*, 78 N. Y. Supp. 934; *Knowlton* v. *Moore*, 178 U. S. 41; *Vanderbilt* v. *Eidman*, 196 U. S. 480; *Merrifield* v. *State*, 212 Ill. 400, and continued as follows:—ED.]

It thus appears that the courts of three different states at least have construed language either identical or similar to that in question, as meaning transfers without consideration, and that the Supreme Court of the United States has intimated a similar construction. Furthermore, some of these decisions were rendered just prior to the passage of the revenue act of 1898. It must, therefore, be presumed that its framers were familiar with such interpretation, and that the statute was passed with reference thereto. This is the presumption of law. *Willis* v. *Eastern Trust Co.*, 169 U. S. 295, 307, 308, 18 Sup. Ct. 347, 42 L. Ed. 752; *Capital Traction Company* v. *Hof*, 174 U. S. 36, 19 Sup. Ct. 580, 43 L. Ed. 873.

I feel justified, therefore, in holding that the words "deed, grant, bargain, sale or gift," as used, referred, each and all of them, to transfers without consideration, and operative by way of gift. Irrespective, however, of the authorities referred to, such would seem to be their natural construction when taken in connection with the context. That Congress did not intend under this section to tax transactions made in the ordinary course of business upon a valuable consideration is apparent, not only because the words "deed, grant, bargain and sale" are so connected with the word "gift" as to invoke and require an application of the maxim, "*noscitur a sociis*," but also because whatever taxes were intended to be imposed by the act upon such transactions were provided for by a subsequent part of the act which required stamps to be affixed upon deeds, contracts, etc., at a specified rate. Furthermore, the latter part of section 29

of the act is but the complement of the earlier part. The one embraces gifts, above a certain amount, made through the medium of a will, the other gifts, otherwise made, that come into possession and enjoyment at the death of the grantor or bargainer, as the donor is there called. It is obvious that, if the section had merely provided that personal property passing by will should be taxed, the intended scheme of taxation would have been a complete failure, for the reason that deeds and grants, by way of gift, to take effect at the death of the grantor, would or might have been substituted for wills in order to evade the tax.

Attention will now be given to the character and effect of the partnership agreement. It seems to me impossible to say that the interest of John I. Blair, which passed to De Witt C. Blair, thereunder was a gift. Valuable considerations are expressed therein, and whether adequate or inadequate is immaterial; but if material, it would be quite impossible to say that they were inadequate. The considerations moved, not only between John I. Blair and De Witt C. Blair, but from them, and each of them, to all of the other partners, and vice versa. What these considerations were, or how valuable they were, we do not know; nor is it at all necessary to figure out in dollars and cents their actual value. They were mutual, and depended upon mutual covenants. Neither John I. Blair, nor his son, nor the two together, could have in any degree abrogated, impaired, or altered the contract. Any such abrogation, impairment, or alteration could only have been effected by the unanimous consent of all the parties thereto. Each partner had an equal interest in its maintenance, and equal power to prevent its alteration. In brief, it had all of the qualities which render any contract which has been duly executed by parties *sui juris*, and for a valuable consideration, unimpeachable. Under it John I. Blair was in effect a life tenant only of his interest therein, and De Witt C. Blair was remainderman. The former during its continuance could not have disposed of his interest in the partnership by sale or by will, contrary to the terms of the agreement, because the entire disposition thereof had already been irrevocably made in case his death should happen, as it did, during the partnership period. Hence his will, which by the way was executed some time prior to the partnership agreement, did not transfer such interest to his son. Dying as John I. Blair did, during the partnership period, the utmost that his will could have been made to speak would have been but to echo what the contract had already spoken. Upon his death, *eo instante*, his interest in the partnership property became De Witt C. Blair's without the intervention of bill of sale, assignment, transfer, or will. The agreement, as I interpret it, executed itself. It provided that the capital of John I. Blair in the firm of Blair & Co., and any increase or profits thereon, should, upon his death, "become transferred to, vested in and owned by the said De Witt C. Blair, absolutely as his property."

If we break up the sentence into its component parts, its interpretation may perhaps be more apparent. It would then read: The interest of John I. Blair shall, upon his death, become transferred to De Witt C. Blair absolutely as his property. It shall become vested in said De Witt C. Blair absolutely as his property, and it shall become (or be) owned by the said De Witt C. Blair absolutely as his property. My conclusion upon this branch of the subject, therefore, is that the partnership agreement was an irrevocable self-executing contract; but whether self-executing or not, upon its delivery De Witt C. Blair had vested rights thereunder in the interest of John I. Blair in the partnership property, defeasible only upon the survivorship of John I. Blair, beyond the partnership period, which rights could not be divested by him by will or otherwise. Such being the case, the tax imposed thereon was unwarranted and illegal. In the *Matter of Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed 178 N. Y. 575, 70 N. E. 1094, on the opinion below, the facts, briefly stated, were these: Baker made an antenuptial agreement by which he agreed to give his intended wife $1,000 on the date of their marriage, and to provide by his will for the payment to her from his estate of $20,000, which she on her part agreed to accept in lieu of dower. Baker died intestate. The question presented to the court was as to the taxability of the $20,000 paid to the widow under said agreement. In determining this point the court said:

"It will doubtless be conceded that the respondent's claim is not one which is dependent for its validity upon a deed or grant of any kind, and, furthermore, that it is not testamentary in its character, although it did not become due and payable until after the death of her husband. It was simply the outgrowth of the contract entered into between the decedent and the claimant, which was founded upon a perfectly good and valuable consideration. * * * It would seem to follow, therefore, that a claim arising from such a source is in the nature of a debt against the estate, and, as such, enforceable like any other debt. * * * But it is said that the contract was entered into in contemplation of, and was not intended to take effect in possession or enjoyment until after, the death of the obligor. This in a certain sense is doubtless true, as it would be of any other form of debt the payment of which was deferred until after the death of the debtor, but this does not affect its validity, or alter its character. * * * Neither, in our opinion, does it subject the debt to taxation under the act in question unless it can be shown that the agreement was entered into in bad faith, and with some evasive intent. * * * "

Another case bearing upon this point is *Matter of Demers*, 41 Misc. Rep. (N. Y.) 470, 84 N. Y. Supp. 1109. The facts in that case were that Demers contracted with the mother of his natural child that if the child were surrendered to him, and he was permitted to have charge of her, then upon his death all his property should belong to

the child. Demers died intestate. His natural daughter thereupon obtained a judgment awarding specific performance of the contract which he had made with the mother. The question presented was whether any succession tax could be imposed under such judgment. The court held that neither the transfer by the intestate laws to the next of kin, nor to the complainant in the suit under the judgment, was taxable, and in reaching its conclusion used this language:

"No doubt the legal title to the property of the deceased did pass by the intestate laws to his next of kin, but such holding by them was in trust for the equitable owner, Mrs. Drouin, and was a mere naked title not coupled with a beneficial interest, and such transfer would not be taxable under the act in question. *Johnston* v. *Spicer*, 107 N. Y. 185, 13 N. E. 753. From the date of the death of Demers to the date of the judgment of the Supreme Court, Mrs. Drouin was the equitable owner of the property of the deceased and upon the rendition of such judgment she was the legal owner of such property and the same passed to her not by will or by the intestate laws but by virtue of the contract obligation which Demers entered into for a valuable consideration in 1862. * * * This transfer was not by gift since the Supreme Court has declared the contract to have had a valuable consideration, but was through a contract of bargain and sale."

To the same effect is the *Matter of Craig*, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed 181 N. Y. 551, 74 N. E. 1116, upon the opinion below. It there appeared that in 1875, Craig made a marriage settlement of all of his property under which the income was payable to him during his life, and at his death the principal was to be paid to his widow and the issue of the marriage, in certain specified proportions. The children of the marriage were all born before May 9, 1885. His entire estate was transferred in accordance with the terms of the will, and the question presented for solution was whether or not such transfers were taxable. The court said:

"The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional, as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract. Const. N. Y. art. 1, sec. 6; U. S. Const. art. 1, sec. 10, subd. 1. In other words, the appellants contend that at least as early as May 9, 1885, they had acquired their rights by irrevocable deed; that such rights whether vested or contingent then constituted present property interests in future estates which were vested in the sense that they were secured to them by deed, subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right

to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute and not merely privileged, could not afterwards be taxed by the state because of well-settled principles of constitutional law. I am inclined to the view that the contention is sound. In the discussion the appellants must be regarded on May 9, 1885, as being in the same position as they would have been in if the remainders had been acquired by purchase instead of gift; and it cannot be that the state can levy an assessment upon the right of a citizen to enjoy the fruits of a prior purchase which, when made, was wholly free from such an imposition."

[The learned judge then quoted from *Matter of Pell*, 171 N. Y. 48, and *Matter of Vanderbilt*, 172 N. Y. 69, 73, *post*, p. 572, and continued as follows: — ED.]

In the case at bar I think the plaintiff's rights accrued at once the partnership agreement was entered into. They were absolute and irrevocable so far as the parties were concerned, and were contingent only upon the happening of an event which did happen. The case appears to me to be within the principle laid down by the above authorities.

My conclusion, therefore, is that the fund taxed accrued to De Witt C. Blair, under an irrevocable contract entered into prior to the passage of the war revenue act, which agreement was based upon valuable and sufficient considerations which were contractual, and that said fund was transferred by said contract, and that such transfer did not constitute a gift within the meaning of said act; further, that the partnership agreement was self-operative, and operated, independently and without the aid of the will of John I. Blair, to transfer to De Witt C. Blair immediately upon the death of John I. Blair the fund in question. Furthermore, since the rights of De Witt C. Blair rested in contract, and accrue at its inception, the same result would be reached, even if technically and momentarily such rights, while in transit to De Witt C. Blair, their grantee and owner, rested in the executor of John I. Blair.

Other points have been raised, and elaborately argued by the Counsel of the plaintiff, but under the circumstances it is unnecessary to discuss them.

I accordingly find for the plaintiff and against the defendant in the sum of $29,729,97, being the amount of the tax paid, besides interest thereon from July 2, 1906, the date of its payment, until judgment shall be entered hereon.[1]

[1] Affirmed in 158 Fed. Rep. 804.

As to when consideration prevents a transfer from being taxable, and as to what consideration is sufficient, see *People* v. *Burkhalter*, 247 Ill. 600; *Lamb* v. *Morrow*, 140 Iowa 89; *State Street Trust Co.* v. *Treas. & Rec'r Gen'l*, 209 Mass. 373; *Matter of Gould*, 156 N. Y. 423; *Matter of Edgerton*, 158 N. Y. 671, affirming 54 N. Y. Supp. 700; *Matter of Baker*, 178 N. Y. 575, affirming, 82 N. Y. Supp. 390; *Matter of Hess*, 187 N. Y. 554, affirming 96 N. Y. Supp. 990; *Matter of Kidd*, 188 N. Y. 274.

CHANLER *v.* KELSEY, Comptroller of the State of New York.

205 U. S. 466. 1906.

This is a writ of error to the Surrogate's Court of the county of New York, State of New York, but its real purpose is to review a decision of the Court of Appeals of the State sustaining an order of the Surrogate's Court, which imposed a transfer-tax upon certain estates arising under appointment by Laura Astor Delano, deceased. 176 N. Y. 486.

Laura Astor Delano was the daughter of William B. Astor. Upon the occasion of her marriage in 1844 to Frank H. Delano, Mr. Astor executed a deed in the nature of a marriage settlement, conveying certain real and personal property to trustees in trust to pay the income to said Laura Delano for life, with remainder to her issue in fee, or in default of issue, to her heirs in fee; and giving her power in her discretion to appoint the remainder "amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will."

In the years 1848, 1849 and 1865 William B. Astor made other deeds, by way of addition to the original marriage settlement, substantially similar in their terms. That of 1848 conveyed certain real estate to Mrs. Delano for life, with power of appointment as to said premises, or any part thereof, "to and among her said issue, brothers, sister Alida, or their issue, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses or acknowledged by her as a will." The deed of 1849 conveyed to trustee certificates for $50,000 of the public debt of Ohio; "to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue, but in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue; and said instrument contained a power of appointment to Laura Astor Delano as follows: 'Provided, however, that it shall be lawful for the said Laura, by any instrument executed duly as a will of personal estate, to dispose of the said capital unto and amongst her issue, brothers, sister and their issue, in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised.'" These deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor.

Laura A. Delano died June 15, 1902, in Geneva, Switzerland, leaving no descendants. By her last will and testament, duly ad-

mitted to probate in the county of New York on October 14, 1902, she exercised the power of appointment conferred in the deeds from her father in favor of the plaintiffs in error.

One of the plaintiffs in error, Arthur Astor Carey, a grandson of William B. Astor, and an appointee to whom Mrs. Delano had appointed the property originally conveyed by the deeds of 1848 and 1849, took an appeal from the order of the Surrogate's Court refusing to dismiss the petition to the Appellate Division of the Supreme Court, where it was held that the act under which the tax was imposed, as applied to this case, was unconstitutional. *Matter of Delano*, 82 App. Div. 147. The state comptroller appealed to the Court of Appeals from the decision of the Appellate Division.

That court sustained the right to impose the transfer tax upon the interests appointed by Mrs. Delano under the powers created by the deeds above referred to. Subsequent decisions were made *pro forma* and a final order on the last remittitur of the Court of Appeals was made in the Surrogate's Court, and the case brought here by all the plaintiffs in error.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

The tax in controversy was imposed under an amendment of the general transfer-tax law of the State of New York, chapter 284, Laws of 1897, which provides as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The validity of this tax was attacked in the courts of New York upon objections pertaining to both the Federal and state constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections made to the validity of this statute by reason of alleged violations of the Federal Constitution. These are: First, that by the imposition of the tax the property of the beneficiaries is taken without due process of law, in violation of the Fourteenth Amendment; and, second, that such taxation vio-

lates the obligation of a contract within the protection of section 10 of Article 1 of the Federal Constitution.

The objection that the property is taken without due process of law is based upon the argument that the estate in remainder was derived from the deeds of William B. Astor and not under the power of appointment received from those deeds by Mrs. Laura A. Delano. In support of this contention, common law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. 4 Kent's Com. 327; 2 Washburn, Real Property, 320. The argument is that the estate which arose by the exercise of the power came from William B. Astor and not from Laura A. Delano, and was vested long before the passage of the amendment of 1897, under the authority of which the tax was imposed, and to tax the exercise of the power therefore takes property without due process of law.

However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others.

Notwithstanding the common law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title. It is so within the purpose of the registration acts. A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment. 2 Sugden on Powers, 3d ed., 19.

"So on an issue to try whether the plaintiff was entitled by two writings, or any other, purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will, in which case it was contended that the devisees were in by the feoffment and not by the will, the court held that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough and pursuant to the issue, and a verdict was accordingly given for the plaintiff." 2 Sugden on Powers, 19, citing *Bartlett* v. *Ramsden*, 1 Keb. 570.

So, in the present case, the plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano.

By statute in England, for the purposes of taxation, it has been provided that the donee of the power shall be regarded, in case of a general power, as the one from whom the estate came. In *Attorney General* v. *Upton et al.*, L. R. 1 Ex. 224, the Court of Exchequer had under consideration the Succession Duty Act (16, 17 Vict. c. 51), and it was held that the appointee under a general power of appointment, taking effect on the death happening since the commencement of the act, takes succession from the donee of the power. The testator, Admiral Fanshawe, by will devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such use as she should by deed or will appoint, and, in default of appointment, for the use and benefit of testator's nephews, C. F. and J. F. Fanshawe, and their issue. She by deed appointed to the use that trustees should after her death receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, in trust for the separate use of the wife, Elizabeth Fanshawe. Section 4 of the act, which is there construed, provides that any person having a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of the act, shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power. All the judges agreed that under section 4 of the act the nephew's wife took the annuity as a succession from the testator's widow and not from the testator himself; that, therefore, a duty of ten per cent was payable. Bramwell, B., was of opinion that the duty was also payable under section 2, which provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property * * * shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition * * * a succession." In speaking of this section the Baron said:

"Now, will these annuitants take by reason of the will of Admiral Fanshawe? We must look, not at the *causa remota*, but at the *causa proxima*, and that is the disposition of Caroline Fanshawe. Again, the act says, that the term predecessor 'shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.' From whom, then, is the interest derived? As I said in *Barker's case* (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law that an

appointee takes his estate from the donor of the power, but I say that it is a rule not applicable to the construction of this statute, and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary."

The learned Baron seems to have gone farther, as to section 2, than his brethren were willing to. *Attorney General* v. *Mitchell*, L. R. 6 Q. B. D. 548. His observations are nevertheless suggestive.

While the entire bench recognized the common law rule that the estate is taken to come from the donor of the power, it enforced the statutory change as to a subsequent exercise of the power, treating the estate as coming from the donee, by whose act it was appointed to the beneficiary.

The statute of New York in question acts equally upon all persons similarly situated. It affects an estate which only became complete by the exercise of a power subsequent to its enactment.

The exercise of the power bestowing property in the present case was made by will. And we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed.

That the will was effectual to transfer the estate was ruled by the Court of Appeals, and its decision on this question is binding here, as was held in *Orr* v. *Gilman*, 183 U. S. 278, which came here for a review of a decision of the Circuit Court of Appeals of New York, rendered in *Matter of Dows*, 167 N. Y. 277, a case which arose under the same statute of 1897. In that case the testator devised real estate in trust to pay the income to his son for life, and, upon his death, to vest absolutely and at once in his children and the issue of his deceased children, as his son should appoint by will. If, however, the son should die intestate the estate was to vest absolutely and at once in his children then living, and the issue of the deceased children. The son exercised the power of appointment by his last will, probated in 1899. The Court of Appeals held that the property was subject to the taxation imposed by the act of 1897; that such tax was on the right of succession and not on the property. It became important in that case to determine whether the property passed by virtue of the will of the donor, David Dows, Senior, and then became vested in the grand-children, or only became vested in them when the power of appointment was exercised by the will of David Dows, Junior.

This court held that the answer of this question must, of course, be furnished by the Court of Appeals in that case. 183 U. S. 282. In other words, the Court of Appeals of New York had the exclusive right to construe instruments of title in that State, and determine for itself the creation and vesting of estates through wills under the laws of the State. "The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court

in so far as it involves a construction of the will and of the statutes." 183 U. S. 288. In the present case the New York Court of Appeals has spoken in no uncertain language upon the subject:

"As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee by her will to divest certain defeasible estates and to vest them absolutely in one person. If this authority had been conferred by will, instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. * * * 176 N. Y. 493.

"As we said through Judge Cullen in the *Dows case:* 'Whatever be the technical source of title of the grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' This accords with the statutory definition of a power as applied to real estate, for it includes an authority to create or revoke an estate therein. (Real Property Law, Sec. 111.) Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and the interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act." 176 N. Y. 494.

As in *Orr* v. *Gilman,* 183 U. S. *supra,* we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will. *United States* v. *Perkins,* 163 U. S. 625, 628; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 288.

We cannot say that property has been taken without due process of law, within the protection of the Fourteenth Amendment, by the manner in which the Court of Appeals has construed and enforced this statute. *Orr* v. *Gilman,* 183 U. S. *supra.*

Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because instead of disposing of the entire estate, ninety-five per cent of the property in-

cluded in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate.

Certainly the remaindermen had no contract with the donor or with the State. For whether the remaindermen received aliquot parts of the entire estate or the same was divested in whole or in part for the benefit of others in the class depended upon the exercise of the power by the donee. The State was not deprived of its sovereign right to exercise the taxing power upon the making of a will in the future by which the estate was given to the appointees.

We find no error in the judgment of the Surrogate's Court entered on the remittitur from the Court of Appeals, and the same is

Affirmed.[1]

MR. JUSTICE HOLMES, with whom was MR. JUSTICE MOODY, dissenting.

[1] The dissenting opinion of MR. JUSTICE HOLMES is omitted.

Compare *Crocker* v. *Shaw*, 174 Mass. 266; *Minot* v. *Treas. & Rec'r Gen'l*, 207 Mass. 588; *Matter of Pell*, 171 N. Y. 48; *Matter of Lansing*, 182 N. Y. 238; *Matter of Fearing*, 200 N. Y. 340.

"The question in this case is whether George W. Wales, the donee of the power, is to be regarded as the decedent whose property passed by will, or whether Thomas B. Wales, the donor of the power, is to be regarded as the decedent. . . . We think that the donor of the power rather than the donee must be regarded as the decedent. The Legislature has not defined the word "decedent" as used in the statute, and has not attempted in terms to deal with property passing under powers of appointment, general or otherwise. It simply has enacted, amongst other things, that the property of a decedent passing by will shall pay a tax except in certain cases. The construction of the statute must be determined, therefore, by the application to the subject matter of the ordinary rules of law relating to powers of appointment, and by considering the manner in which those rules have been applied elsewhere to statutes imposing a tax on successions or legacies. . . . Generally speaking, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor. . . . This is the ancient and established rule. . . . Although for some purposes the instrument by which the power is executed is regarded as an independent instrument, and the execution of the power by will constitutes the property assets of the donee's estate, the general rule is as we have stated it. If the power is not executed, the property passes according to the disposition contained in the instrument creating the power, and neither the donee nor those claiming through him have any right in the property by virtue of the unexecuted power. In England it is expressly provided by statute that the party executing the power shall be regarded in the case of a general power as the one from whom the estate is received. But for the statute, it is clear, we think, that the donor of the power would be so regarded." — *Per* MORTON, J., in *Emmons* v. *Shaw* 171 Mass. 410, 411. And see *Hoyt* v. *Hancock*, 65 N. J. Eq. 688. But compare *Commonwealth* v. *Stoll*, 132 Ky. 234; *Minot* v. *Treas. & Rec'r Gen'l*, 207 Mass. 588.

IN RE NEWCOMB'S ESTATE.

76 N. Y. Supp. 222. 1902.

APPEAL from surrogate's court, New York county.

Proceedings to fix the amount of the property of Josephine Louise Newcomb, deceased, subject to a transfer tax. From a decree of the surrogate fixing such amount, the executors appeal. Affirmed.

See 72 N. Y. Supp. 58.

Argued before VAN BRUNT, P. J. and HATCH, MCLAUGHLIN, and INGRAHAM, JJ.

INGRAHAM, J. The question presented on this appeal is as to whether certain shares of stock of domestic corporations was subject to a transfer tax upon the death of the testatrix. This proceeding was instituted by the petition of the executors, which alleged that on the 8th day of April, 1901, the testatrix, a resident of the city of New Orleans, La., departed this life at New York City, N. Y., leaving a last will and testament, duly admitted to probate in New Orleans, leaving property in this state subject to the payment of the tax imposed by the law in relation to taxable transfers of property. Upon this petition an order was entered referring it to one of the appraisers to fix a fair market value of the property subject to taxation. It appeared before the appraiser that there were certain shares of stock of domestic corporations which had come into their hands as such executors; that the certificates of such shares were not in the state of New York at the time of the testatrix's death; that the shares were not in the name of the testatrix; that these stocks had been purchased for the testatrix by Pomeroy Bros., stockbrokers in the city of New York, and were paid for by her, the stock having been transferred upon the books of the corporation to Pomeroy Bros., who thereupon indorsed their name upon the blank transfer printed upon the said certificates, so that the same could be transferred to the testatrix, and the same, so indorsed, were then delivered by Pomeroy Bros. to the decedent. It is conceded that, if this stock had stood in the name of the testatrix at the time of her death, it would have been property within this state subject to taxation. It is claimed by the executors, however, that, as the stock stood in the name of Pomeroy Bros., and not in the name of the testatrix, she, not holding the legal title to the stock at the time of her death, was not the owner of the stock, but had merely a cause of action to require the stock to be transferred, and this cause of action, not being property within this state, was not subject to taxation. The provision of the tax law under which the comptroller claims that this property is taxable (section 220 of chapter 908 of the Laws of 1896) reads as follows:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over, or of any

interest therein, or income therefrom, when the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death."

It is now settled that the interest of a decedent in domestic corporations represented by certificates of stock is property within the state, within the meaning of the transfer tax act, and therefore subject to taxation. *In re Bronson's Estate,* 150 N. Y. 1, 44 N. E. 707. Whether this testatrix held the legal title to this property, or an equitable title, which at any time she could have transformed into the legal title by simply presenting the certificates to the officers of the corporations, it was an interest in property which passed by her will, and which was taxable. By the purchase of the stock of these domestic corporations and receiving the certificates therefor, she at least became the equitable owner of the stock. She was entitled at any time to become vested with the legal title, and certainly this equitable title was something more than a mere chose in action. It was, in effect, a property interest in these domestic corporations which could be bought and sold, and which passed by her will. To say that this equitable title to shares of stock in a domestic corporation is not property would be to subordinate the substance to a mere technicality, which was expressly disapproved by the court of appeals *In re Houdayer's Estate,* 150 N. Y. 37, 44 N. E. 718. This property right in these corporations was in this state, because the property of the corporations was located here. While the equitable title could be transferred without the transferee coming to this state, such an equitable transfer was valuable only because of the fact that on coming to this state and presenting the certificates, with the proper transfer, to the corporation whose stock was represented, the transferee could obtain a legal title to the stock. In the Houdayer Case the conclusion of the court was that a deposit of money in a bank in this state by a nonresident, although technically a debt, is still money for all practical purposes, and as such is taxable under the transfer tax act. Certainly, if a deposit of money in a bank in this state by a nonresident, where the technical relation that exists is one simply of debtor and creditor between the nonresident and the bank, is money for all practical purposes, and taxable in this state, the equitable right to shares of stock in a domestic corporation is for all practical purposes property in this state. We are, as we have been told by the court of appeals, to look at the practical, not the mere technical, ownership to determine whether or not a right which passes under a will is property within this state; and, irrespective of just what right this testatrix acquired when she purchased the stock of New York corporations, furnished the consideration which was paid for it, and received from her agents the certificates of stock, with the necessary instruments of transfer which enabled her at any time, upon presentation of such certificates, to have them transferred in her name upon the books of the

corporations, she was, for all practical purposes, the owner of that stock, and as such the title thereto passed to her executors upon the probate of her will and upon the issuance of letters to them, and it is this transfer of property of domestic corporations which is taxable by the law of this state.

It follows that the order appealed from should be affirmed, with costs.

All concur.[1]

ESTATE OF CORNELIUS VANDERBILT, DECEASED.

THE COMPTROLLER OF THE STATE OF NEW YORK, APPELLANT; WILLIAM K. VANDERBILT ET AL., AS EXECUTORS ET AL., RESPONDENTS.

172 N. Y. 69. 1902.

HAIGHT, J. Prior to an amendment of 1899 the Transfer Tax Law (L. 1896, c. 908, section 230, as amended L. 1897, c. 284) provided that "Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof * * * ." Under this statute it has repeatedly been held that future contingent estates were not taxable until they vested in possession and the beneficial owner could be ascertained. The question now presented is as to whether this statute has been changed. The legislature, by chapter 76 of the Laws of 1899, amended section 230 of the Tax Laws, known as chapter 908 of the Laws of 1896, by which the provision of the statute quoted is omitted and in place thereof we have the following: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable." Then follow provisions particularly specifying the manner in which the value of future or limited estates shall be determined. Then it is provided that "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, *out of the property transferred.*"

It seems to me clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer

[1] Affirmed without opinion. 172 N. Y. 608.

tax, upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid "out of the property transferred." So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers.

By the seventeenth clause of the will of the testator the residue and remainder of his estate was given in trust to his executors for the benefit of his son Alfred G. Vanderbilt, which trust is to continue until he becomes thirty years of age, at which time one-half of the trust estate is to be turned over to him, and, as to the balance, the trust is to continue until he becomes thirty-five, when the remainder is to become his absolutely. The will also contains a provision that in case he dies before becoming thirty or thirty-five the estate shall be given to other persons. The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the possession of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five. *Matter of Seaman*, 147 N. Y. 72; *Campbell* v. *Stokes*, 142 N. Y. 23; *Manice* v. *Manice*, 43 N. Y. 370; *Warner* v. *Durant*, 76 N. Y. 133; 2 Washburn on Real Property, 629.

Under the view taken by me of this statute, the transfer tax still remains a tax upon succession. Each trust estate created is to be separately appraised and the tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate; and when fixed, the tax is forthwith payable out of the trust estate.

The order of the Appellate Division and that of the surrogate should be modified as indicated herein, and the proceedings remitted to assess the tax, with costs to the Comptroller.

CULLEN, J. I vote for the reversal of the order below. It is conceded that the statute on its face provides for the immediate taxation of the whole corpus of the trust estate, regardless of the fact that the persons who may ultimately receive either the whole or part of such corpus cannot now be ascertained, and for the payment of the tax out of the fund. I concede that if the statutory scheme creates a property tax it cannot be sustained. I think that such is the doctrine of the *Pell Case* 171 N. Y. 48 in which I fully concurred. But in my opinion the tax now sought to be imposed is not a property tax and the *Pell* case is not an authority for such a claim. In that case the interests of the devisees and legatees attempted to be taxed were given by the will of the testator who had died long prior to the enactment of any inheritance tax. Technically they may have been, and probably were, vested subject to be divested

by death before the demise of the life tenant, but in the ordinary sense of the term they were contingent, that is to say, it was impossible to determine who would actually enjoy the property until the death of the life tenant. Nevertheless the interests of the devisee accrued on the death of the testator, and at that instant, and were immune from legislative attack whether contingent or vested. *Brevoort* v. *Grace*, 53 N. Y. 245. We, therefore, held that the legislature could not impose a tax on the transfer of property which had previously been made. This case presents a situation the reverse. True, it cannot now be told who will ultimately enjoy the *corpus* of the estate till the life tenant dies or arrives at the prescribed age. But the legislature might have forbidden the suspension of the absolute ownership of the property for any period whatever as it has forbidden suspension for more than two lives in being. As said by the Supreme Court of the United States of the inheritance tax: "The right to take property by devise or descent is the creature of the law and not a natural right — a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege." *Magoun* v. *Trust Co.*, 170 U. S. 283; *Matter of Dows*, 167 N. Y. 227. Therefore, the state can say a devise or bequest may be made where the interests are contingent or the ultimate beneficiaries unknown till after some period, but in such case there shall be exacted from the beneficiaries, whoever they may prove to be, a tax to be presently taken out of the property. This, in effect, it has said, for the provision of the Transfer Tax Law under consideration was in force at the time of the testator's death. The fact that the tax is to be paid out of the property does not render it a tax on property. In both the federal and state inheritance tax laws are to be found provisions, in the case of personalty, requiring the executor to deduct the amount of the tax before turning over the legacy to the legatee, and in the case of realty making the tax a lien on the property; yet nobody has supposed that these provisions render the tax a property tax. If such was their effect, neither the federal nor state statute could be upheld. A tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition.

PARKER, Ch. J., and WERNER, J., concur with HAIGHT and CULLEN, JJ.; GRAY and VANN, JJ., concur with O'BRIEN, J.

Ordered accordingly.[1]

[1] The dissenting opinion of O'BRIEN, J., is omitted.

Compare *Matter of Brez*, 172 N. Y. 609.

As to the taxation of life estates and vested and contingent remainders, see *Billings* v. *The People*, 189 Ill. 472; *The People* v. *McCormick*, 208 Ill. 437; *Estate of Kingman*, 220 Ill. 563; Illinois, Acts (1909), p. 311, § 25; *Minot* v. *Winthrop*, 162 Mass. 113; *Dow* v. *Abbott*, 197 Mass. 283; *State* v. *Probate Court*, 100 Minn. 192; *Attorney General* v. *Pierce*, 6 Jones Eq. 240; *Commonwealth's Appeal*, 127 Pa. 435; *Bailey* v. *Drane*, 96 Tenn. 16.

JAMES H. CONNELL, ET AL. *v.* HENRY CROSBY, COUNTY TREASURER.

210 Ill. 380. 1904.

MR. JUSTICE BOGGS[1] delivered the opinion of the court:

This was a proceeding instituted in the county court of Mercer county by the appellee, county treasurer of the county, under the provisions of sections 13, 14 and 15 of the act entitled "An act to tax gifts, legacies and inheritances," etc., approved June 15, 1895 (Hurd's Stat. 1899, chap. 120, pars. 378–380), and to fix and recover the amount of the inheritance tax alleged to be payable by James H. Connell, executor, and Vashti Drury, executrix, of the last will of William Drury, deceased. The proceeding resulted in the entry of an order in the said county court finding that said executor and executrix should, in that capacity, pay to the county treasurer of Mercer county the sum of $3310.23, with interest thereon at six percentum per annum from the 13th day of March, 1897, as inheritance tax on the trust funds in the hands of said executrix and executor. This is an appeal perfected to reverse that order. . . .

The will of the decedent directed that 91/100 of the residue of his estate should be devoted by his executors to the founding of an institution in Mercer county, to be called the "William and Vashti College," for the purpose of diffusing knowledge "along polytechnic lines, where the education would be practical and of a mechanical and industrial character as well as scientific and classical, and free from denominational or sectarian bias or influence." Said William Drury died on March 13, 1897. Under the statute then in force, bequests for educational purposes were subject to the payment of the inheritance or succession tax. Subsequently, on July 1, 1901, the statute was so amended as to exempt bequests for educational purposes. Hurd's Stat. 1901, chap. 120, par. 367*a*. The petition of the State's attorney, in the case at bar, for the collection of the tax on this bequest was not filed until after the amendatory act of 1901 had been adopted and become effective. The appellants contend the right to collect the tax on this bequest for educational purposes, which arose at the time of the death of the said William Drury, was not a complete and valid right, but was a mere inchoate right, and so remained executory until the proceeding provided by the statute for the collection of the tax should be at least begun, if not completed, and that the exemption of bequests of this character from liability to pay the tax, which was effected by the act of 1901, operated to destroy the mere executory right to demand and collect a tax on the bequest for educational purposes.

The amendatory act of 1901 does not, in terms, repeal the former act. It contains no saving clause, nor does it in terms purport to

[1] Parts of the opinion are omitted.

affect, in any way, any right, whether vested or inchoate, which might then exist. Section 4 of chapter 131 (Hurd's Stat. 1899, p. 1650) furnishes the guide for determining the effect to be given the amendatory enactment. That section provides: "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any * * * right accrued or claim arising under the former law, or in any way whatever to affect * * * any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceedings." It is to be assumed the amendatory act was framed in view of the provisions of said section 4 of chapter 131, and that it was the legislative intent the amendatory act should have prospective operation, only. Statutes declaring the effect of or the construction to be given subsequently enacted repealing acts will be deemed operative and effective by the courts unless a contrary intent is plainly manifested in the later enactment. (*Farmer* v. *People*, 77 Ill. 322; 26 Am. & Eng. Ency. of Law, — 2d ed. — 681.) The right which accrued or the claim which arose to the tax, under the statute in force at the time of the death of the testator, was therefore unaffected, and remained enforcible notwithstanding the subsequent enactment exempting bequests for educational purposes from the tax. *Farmer* v. *People, supra; Provident Hospital* v. *People*, 198 Ill. 495. . . .

It was stipulated that the heirs-at-law of said William Drury, deceased, instituted a suit in equity, under the statute, to contest the validity of the will of said testator, and that the appellant executors, in defraying proper and lawful expenses in and about the defense of the suit, disbursed the sum of $12,363.65 out of the assets of the estate. In the accounting of the executors this expenditure was presented to and allowed by the court as a proper disbursement. In the ascertainment of the amount on which to compute the tax, the county court refused to deduct the amount of this disbursement. In this we think the court was in error. Under the statute which authorizes the tax, property which descends to heirs-at-law, within specified degree of kinship to the testator, is only taxable on the value thereof in excess of $20,000 which descends to each heir,[1]

[1] In some states the estate or property, which is exempt if below a certain sum, is the portion passing to the particular legatee or distributee. *In re Wilmerding*, 117 Cal. 281; *People* v. *Koenig*, 37 Colo. 283; *Booth* v. *Commonwealth*, 130 Ky. 88; *Succession of Abadie*, 118 La. 709; *State* v. *Hamlin*, 86 Me. 495; *Attorney General* v. *Barney*, 211 Mass. 134; *State* v. *Bazille*, 97 Minn. 11; *State* v. *Probate Court*, 101 Minn. 485.

In others the estate is taxable if it amounts in the aggregate to more than the specified sum exempted, although the separate portions to be distributed may be each below the limit. *Nettleton's Appeal*, 76 Conn. 235; *McGhee* v. *State*, 105 Iowa 9; *Herriott* v. *Bacon*, 110 Iowa 342; *Gilbertson* v. *McAuley*, 117 Iowa 523; *State* v. *District Court*, 41 Mont. 357; *Stellwagen* v. *Probate Judge*, 130 Mich. 166; *Matter of Costello*, 189 N. Y. 288 (but now see Laws of New York (1909), c. 62, *ante*, p. 514);

and the rate of tax in such instance is only one dollar on each $100 of such excess. The property descending to other heirs-at-law of a different class is exempt from taxation except on the excess of $2000 received by each person within such class, and the rate of taxation on the amounts received by those within this class is two dollars on each $100. The statute exempts no part of a bequest which is not to be taken by an heir-at-law, and fixes a higher rate if taken on bequests and legacies to others than heirs-at-law, the rate of taxation in this case being fixed at six per cent. The defense made by the executors in the proceeding to contest the will was for the purpose of upholding and maintaining the bequest in favor of the college. The record does not disclose the degree of kinship of the heirs-at-law who contested the validity of the will, and for that reason it cannot be known to what extent the appellee, as the representative of the public in the matter of the collection of this tax, would have been affected had the contest of the will been successful. The exemptions allowed to heirs-at-law might have left no property whatever subject to the tax had the will been declared invalid. That the amount to be taxed would have been materially lessened by such exemptions is certain, and that the rate of taxation on such lesser amount would have been materially lowered is also certain. The successful defense of the attack upon the validity of the will was in the interest of the State, as the recipient of the tax, on the bequest to the college, and we think that in ascertaining the amount on which the tax should be computed the expenditures in defense of the will should have been deducted, so that the tax should not be computed upon it.

Counsel for appellee cite *In re Line's Estate*, 26 Atl. Rep. (Pa.) 728, and *In re Westurn's Estate*, 46 N. E. Rep. (N. Y.) 315, as authority for an opposite conclusion. In the former of these cases the trustee incurred as expenses of administration the sum of $3262.80, and it was held that that sum was properly subtracted from the total amount of the estate in ascertaining the amount upon which the tax should be figured. Legatees in that case incurred an expense of something over $12,000 in employing counsel to assist the trustee, and the court refused to allow any deduction of that $12,000. The distinction is, that that was an expense not incurred by the trustee, and was therefore no part of the expenses of the administration of the estate, so far as the trustee was concerned. In the other case, *In re Westurn's Estate*, the sum which it was sought to subtract as

Howell's Estate, 147 Pa. 164; *State* v. *Alston*, 94 Tenn. 674; *Dixon* v. *Ricketts*, 26 Utah, 215.

In some states only the excess above the exemption is taxable. *State* v. *Hamlin*, 86 Maine 495; *State* v. *Bazille*, 97 Minn. 11; New York, Laws (1909), c. 62, *ante* p. 514.

In others if the estate or portion exceeds the exemption, the whole of it, not merely the excess, is taxable. *Gilbertson* v. *McAuley*, 117 Iowa 522; *State* v. *District Court*, 41 Mont. 357; *State* v. *Alston*, 94 Tenn. 674.

expenses of administration was not money expended by an administrator, executor or trustee, but by heirs who had successfully contested the will, for solicitor's fees and other expenses in setting aside the will. It is thus seen that neither of these cases supports the position taken by the appellee.

The total value of the property of the decedent was $321,555.04. It consisted of real estate in Illinois of the value of $199,599, personal property in Illinois of the value of $27,576.14, and real estate in Kansas, Colorado, Nebraska and Texas of the aggregate value of $94,379.90. The indebtedness aggregated $126,975.90, in addition to the costs and expenses of the settlement of the estate. The indebtedness was due creditors who resided in Illinois, except a note of $4507.10, which was due to a citizen of Minnesota but was made specially payable at Keithsburg, in Mercer county, Illinois. The court decided that the tax could not be computed on the value of the lands situated in other States than Illinois, but held that in order to ascertain the amount on which to compute the tax the value of the personal property should be deducted from the total indebtedness of the estate, and the remaining indebtedness should be apportioned upon all the real estate, both foreign and domestic, and that the tax should be laid upon the amount so apportioned on the value of the lands in Illinois. The lands in the sister States were not subject to any specific liens to secure any of the indebtedness or specially charged with the payment of any part of it by any act of the testator, nor was any of the indebtedness due to any citizen of any sister State in which such lands were situate. This ruling operated to increase the amount on which the tax was required to be paid to the extent that the remainder of the indebtedness was so apportioned on the lands in sister States, and by indirection laid a tax on the foreign lands, which, as we have seen, could not be lawfully directly imposed thereon. The ruling was erroneous. If the foreign lands had in any way been subject to an encumbrance or lien, vendor's or otherwise, to secure the payment of indebtedness of the testator, or if the indebtedness had been due to a citizen of the sister State wherein was situated the real estate belonging to the decedent, a different question might be presented. . . .

For the reasons indicated, the order of the county court is reversed, and the cause will be remanded to that court with directions to proceed in conformity with what is here said.

Reversed and remanded.[1]

Mr. JUSTICE SCOTT took no part in the consideration or in the decision of this case.

[1] In estimating the value of the estate to be taxed debts due from the deceased are deducted. *Hopkins' Appeal*, 77 Conn. 644; *Succession of May*, 120 La. 692; *Matter of Westurn*, 152 N. Y. 93; *Orcutt's Appeal*, 97 Pa. 179; *Memphis Trust Co.* v. *Speed*, 114 Tenn. 677.

Commissions of the personal representative are deducted. *Matter of Westurn*,

152 N. Y. 93; *Matter of Gihon*, 169 N. Y. 443. As to the trustees commissions, see *State* v. *Probate Court*, 101 Minn. 485; *Matter of Gihon*, 169 N. Y. 443.

And so expenses of administration. *Hopkins' Appeal*, 77 Conn. 644; *Callahan* v. *Woodbridge*, 171 Mass. 595; *Matter of Gihon*, 169 N. Y. 443; *Orcutt's Appeal*, 97 Pa. 179.

As to counsel fees incurred during a contest of the will or in litigation during administration, see *Matter of Westurn*, 152 N. Y. 93; *Line's Estate*, 155 Pa. 378; *Shelton* v. *Campbell*, 109 Tenn. 690.

In estimating a tax on personal property a debt secured by a mortgage of realty is deducted. *In re Fox's Estate*, 159 Mich. 420. But compare *In re Sutton's Estate*, 149 N. Y. 618, affirming, 38 N. Y. Supp. 277. See *McCurdy* v. *McCurdy*, 197 Mass. 248.

In estimating a state tax the Federal estate tax was first deducted in *Hooper* v. *Shaw*, 176 Mass. 190. But not in *Matter of Gihon*, 169 N. Y. 443.

CHAPTER IX.

CONTRACTS AND TRANSFERS OF AN EXECUTOR OR ADMINISTRATOR.

FERRIN, RESPONDENT *v.* MYRICK, ADMINISTRATOR, APPELLANT.

41 N. Y. 315. 1869.

HUNT, Ch. J.[1] It is provided by the statute of this State, that all lawful acts done by administrators who may be removed or superseded, shall remain valid, and shall not be impeached by any subsequent revocation of the authority of such administrator. (2 R. S., 79 m., Sec. 47.) The plaintiff's claim stands, therefore, as if Jacob Hartman had continued to be administrator of Sanford Hartman, and the action had been brought against him as administrator.

The contract for the gravestones was proved to have been made. They were of a character suitable to the rank and station in life of the deceased, and to the circumstances of his estate. The defendant, as administrator, had assets in his hands applicable to their payment. Can the action in such case be maintained against the estate, as a matter of course, or is the remedy against the administrator personally? The administrator contracted for the purchase and delivery of the monument. He had a right to contract for stones suitable to the rank in life of the deceased, and to the estate left by him. He had no right to contract for stones of an unsuitable character. Thus, for the grave of a man leaving an estate of $10,000, or $20,000, monuments of which the expense should be $100 or $200, would very likely be deemed suitable and reasonable. If the same individual should leave an estate of but $500, and a family of small children, an expenditure of several hundred dollars for that purpose probably would not be deemed suitable or reasonable. *Hancock* v. *Podmore*, 1 B. & Ad., 260; 20 Eng. C. L. R. Whether the particular article is suitable and reasonable, or otherwise, is a question which the seller is not called upon to decide. That question is not left to his decision. It belongs to the administrator. He decides it at his peril, to be allowed or disallowed, in the final settlement of his accounts with the surrogate. The seller accepts the judgment and decision of the administrator, acts upon his direction, and makes and delivers the stones or the monument upon his direction and upon his agreement. It is, therefore, most reasonable and proper, that the administrator should be liable himself to the seller, although the estate may not ultimately be liable to him, or to any one else, for the article furnished.

[1] The statement of facts and the dissenting opinion of MURRAY, J., are omitted.

Again, it is to be considered, that the administrator is not the agent of the testator, or of the estate, and therefore allowed to contract in its behalf. We are apt to look upon an administrator as holding a like position to that held by a railroad manager, or a bank president. The latter officer orders and receives at the bank a set of ledgers, with the name of the bank entered in the same. A railroad manager orders and receives a quantity of rails, which are delivered and laid down upon the track of his company. In each of these cases, it would be quite proper for the jury to find that the purchase was made for the corporation, and not by the officer individually. Not so, however, with the administrator. He has the title to the personal estate. He has no principal behind him for whom he can contract as agent. This is the policy of the law. The estate in the personalty is given, by the law, directly to the administrator. For the purpose of use and sale the title vests in him, and he is held responsible as owner. 1 Wms. Exrs., 530, 539, 456. As owner, he must account to the persons ultimately entitled to distribution; and as owner, he sells, disposes and contracts, as his judgment dictates. These considerations fix the liability for the debt in question, upon the administrators personally, and not upon the estate. So are the authorities. In *Meyer* v. *Cole* 12 John R., 349, the declaration contained three counts. The first for goods sold by the plaintiff's testator to the defendant's testatrix, in their lifetime respectively. The second was for work and labor and the promise, laid as in the first count. The third stated, that the defendants, as executors aforesaid, were indebted to the plaintiff's testator, in his lifetime, for work and labor at the funeral of the testatrix; and being so indebted, the defendants, as executors as aforesaid, undertook and promised to pay the testator in his lifetime. To this declaration there was a demurrer, and judgment was rendered for the defendants. The court say: "The declaration is clearly bad. The cause of action, stated in the last count, arose after the death of the testatrix, and could not be joined with a cause of action arising in her lifetime. It would require different judgments." In *Demott* v. *Field's Administrator* 7 Cowen R., 58, the declaration contained four counts; the first two in assumpsit on promises of the intestate; the last two on promises of the defendant as administrator, to pay for funeral expenses of the intestate. The cause was referred; a general report was made in favor of the plaintiff without distinguishing upon which set of counts, whether that upon promises of the intestate or of the defendants. A motion being made in arrest of judgment, the court say, "the case of *Meyer* v. *Cole* is in point for the motion. The different set of counts, two being on promises of the intestate, and two on those of defendants, for a consideration arising after the death of the intestate, require different judgments, the first *de bonis intestatoris*, the last *de bonis propriis*. And though the estate of the intestate in the defendants' hands

would be liable over, to the satisfaction of the claim for funeral expenses, that does not alter the form of the proceedings. The defendant would be liable upon the promise charged upon him, whether he has property of the intestate to answer it or not." The judgment was arrested. In *Gillet* v. *Hutchinson's Adm's* 24 Wend. R., 184, the plaintiff declared on a promissory note, made by Dyget to the order of the intestate, and by him indorsed in his lifetime, averring demand and notice of non-payment. The second count was like the first, omitting the averment of notice. The third was for money lent by the plaintiff to the defendants as administrators. The fourth for money paid to, [and] for the use of the defendants as administrator. The fifth for money had and received by the defendant as administrators, to and for the use of the plaintiff. The sixth, for that the defendants, as administrators, accounted with the defendants for divers sums due, and owing from the defendants, as administrators aforesaid. To this complaint there was a demurrer and a joinder. By the court, Bronson, J., "Independent of minor objections, there is a fatal misjoinder of counts. The two first counts are upon promises made by the intestate in his lifetime, though the right of action did not accrue until after his death. On these counts the judgment would be *de bonis intestatoris*. Although a promise by the administrator is alleged, the counts show that the original obligation was contracted by the intestate. *Carter* v. *Phelps*, 8 J. R., 440. The four remaining counts are on promises made by the administrators, and relate wholly to transactions after the death of the intestate. On these counts the judgment would be *de bonis propriis*. *Rose* v. *Bouler*, 1 H. Bl., 108; *Bridgen* v. *Parkes*, 2 B. & P., 424; *Powell* v. *Graham*, 7 Taunt., 580; *Jennings* v. *Newman*, 4 T. R., 347; 2 *Saunders*, 117 e, note; *Meyer* v. *Cole*, 12 J. R., 349; *Demott* v. *Field*, 7 Cow., 58. The count upon the account stated might have been joined with the two first counts, if the accounting had been of moneys, due from the intestate in his lifetime, but it is of moneys due from the administrators. *Reynolds* v. *Reynolds*, 3 Wend., 244. The case of *Powell* v. *Graham* 7 Taunt., 580, so far as it relates to the *insimul computassent* count, is not law in this State, if it is in England." Judgment was ordered for the defendants.

In the case of *Reynolds* v. *Reynolds* 3 Wend., 244 above cited, the rule is thus laid down by Savage, Ch. J.: "The only question, therefore, is whether the last count charges a personal liability, and whether a recovery upon it requires a judgment in his representative or individual capacity. The count appears to be taken from 2 Ch. Pl., 61–2, and states that the defendant, as administrator as aforesaid, accounted with the plaintiff concerning divers sums of money, due and owing from the defendant, as administrator as aforesaid, and that after such accounting the defendant, as such administrator as aforesaid, was found in arrears, and as administrator as aforesaid

promised to pay. Had the count stated the accounting to be *of and concerning divers sums of money due and owing from the intestate in his life time to the plaintiff*, it would have fallen precisely within the case of *Secor* v. *Atchinson* 1 H. Bl., 102, in which such a count was held to be properly joined with other counts stating promises by the intestate. The distinction is between causes of action existing in the lifetime and those arising after the death of the testator or intestate. In the former cases, the judgment should be against the goods of the deceased; in the latter, against the goods of the representative." The learned judge proceeds to discuss further the cases in this State and in the English courts.

The cases of *Chouteau* v. *Suydam* 21 N. Y. R., 180, and *Noyes* v. *Blakeman* 2 Seld., 578, do not present the precise questions before us, although in them are discussed principles of the same general character. It can hardly be said that they impair the force of the cases cited, as none of them are considered by the learned judge who writes the opinion in *Chouteau* v. *Suydam;* and the case of *Noyes* v. *Blakeman* was quite different in all its aspects. No other cases have been decided in the courts of this State that bear upon this point, so far as my examination has extended. The following principles are settled by these authorities:

1. That for all causes of action arising upon a contract made by the testator in his lifetime, an action can be sustained against the executor as such, and the judgment would be *de bonis intestatoris*.[1]

2. That in all causes of action, where the same arises upon a contract made after the death of the testator, the claim is against the executor, personally, not against the estate, and the judgment must be *de bonis propriis*.

3. That these different causes of action cannot be united in the same complaint.[2]

The English authorities upon this question are not so clear or so consistent with each other as those of this State.

In respect to the non-liability of the estate, for contracts made by the executor after the death of his testator, the learned Judge Williams, in his work on executors, gives the rule substantially as I have deduced it from our authorities. He says: "It seems to have been once considered, that wherever an action was brought against an executor, on promises laid to have been made after the death of the testator, he was chargeable in his own right, not in his representative capacity." 2 Wms. Exrs., 1507, citing Cro. Eliz., 91; Cowp. 289, 4 T. R., 348. He adds that the modern authorities have established that in several instances, the executor may be used *as executor* on a promise made by him as executor, and that a declara-

[1] Authorities are collected in 2 Woerner, Am. Law of Adm. (2d. ed.), § 380; 3 Williams, Exec. (6th. Am. ed.), p. 1974 *et seq.*

[2] *Demott* v. *Field*, 7 Cow. 58; *Corner* v. *Shew*, 3 M. & W. 350, *accord.*

tion founded on such promise will charge the defendant no further than a declaration on a promise of the testator. He then cites *Dowse* v. *Cox* 6 B. & C., 255, where Biddle, who had submitted to arbitration died before award made (it having been agreed that death should not abate the reference), the arbitrator awarded that the executor should pay £225 out of the estate of Biddle; and that being so liable, the defendant, as executor, promised to pay. The court held that the judgment must be *de bonis testatoris*. The action and the judgment being upon a cause arising in the testator's lifetime, the action could not be defeated by the defendant's personal promise to pay. The judgment was right.

He then cites *Powell* v. *Graham* 7 Taunt., 581, which was also a case where the defendant as executor, had promised personally, but when the services had all been rendered to the testator in his lifetime. The judgment was properly *de bonis testatoris*. To this case the author appends the remark, that it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff, or of money due from the defendant as executor. To sustain this statement, the case of *Powell* v. *Graham, supra*, is cited. This case does not justify the remark, but is an authority to the contrary. It is, however, sustained by *Ashley* v. *Ashley* 7 B. & C., 444, which is cited. This case is in hostility to the authorities of this State before cited, and to *Rose* v. *Bouler* 1 H. Bl., 108; *Jennings* v. *Newman* 4 T. R., 347; *Brigden* v. *Parkes* 2 B. & P., 426; and to 2 Saunders, 117 *a*, a note to *Coryton* v. *Lithye*, where the authorities are collected. The statement, I think, cannot be sustained.

He further says, that "it seems" that a count charging that the defendant as executor, was indebted to the plaintiff for so much money paid to him as executor, and as executor promised to pay, charges the defendant in his representative character. In its broad terms, this proposition is in hostility to the cases, but in the instance put by the author it is sound. Thus, two persons are jointly bound as sureties; one dies, and the survivor is obliged to pay the whole debt. In such case, if the deceased had been living, the survivor might have sued him for contribution in action for money paid. The contract was made by the testator himself. The action is upon his contract, and upon principle the judgment should be *de bonis testatoris*.

The author immediately adds p. 1509: But a count alleging that the defendant, as executor, was indebted for so much money lent to him as executor, and that as executor he promised to pay, charges him personally, and the only possible judgment is *de bonis propriis*. And so it is, he says, of a count which charges that the defendant, as executor, was indebted for money had and received, as executor, to the use of the plaintiff, and as executor promised to pay, the judgment must be *de bonis propriis;* and so of a count for use and occu-

pation and for goods sold and delivered to the defendant, as executor, after the testator's death. 1510.

In all these cases, the law holds the transaction necessarily to be that of the executor personally, and that the averment of a promise as executor is a *nundum pactum*. No promise, as executor, can be made, except upon a transaction having an origin before the death of the testator.

The English cases have generally held to these rules, though not with entire consistency. I refer to the most important of them, without comment. *Corner* v. *Shew*, 3 M. & W., 350; the same, 4 id., 162, *n.*; *Ashley* v. *Ashley*, 7 B. & C., 444; 14 Eng. C. L., 77; 1 Ch. Pl., 205; *Rogers* v. *Price*, 3 Y. & J., 28; *Tugwell* v. *Heyman*, 3 Camp., 298.

It is certainly the duty of the executor to pay the funeral expenses of the deceased from his estate, and it has been well held that suitable gravestones are a part of such expenses. 2 Wms. Ex., 871 and note; 2 Redf. on Wills, 224. The expenses do and should fall upon the estate and not upon the executor. But it does not follow, as a logical sequence, that an action at law can be maintained against the estate to recover the amount. I have endeavored already to show why the action should not be sustained against the executor as such, and why it may be sustained against him personally. It ought to be added, that in case of the fraud or insolvency of the executor, an equitable cause of action would probably be thereby created against the estate, which could be enforced in behalf of the creditor, and which would enable him to maintain a claim against the estate directly.

The judgment of the General Term should be reversed, and the order of the Special Term affirmed with costs.

HUNT, Ch. J., WOODRUFF, GROVER, DANIELS and JAMES, JJ., for reversal of General Term.

MURRAY, MASON and LOTT, JJ., for affirmance of General Term.

Order of General Term reversed and that of Special Term affirmed. [1]

[1] *Durkin* v. *Landley*, 167 Mass. 577; *Trueman* v. *Tilden*, 6 N. H. 201; *Demott* v. *Field*, 7 Cow. 58; *Corner* v. *Shew*, 3 M. & W. 350; *Brice* v. *Wilson*, 8 A. & E. 349n. (where the executor ratified the contract), *accord*. *Campbell* v. *Ely*, 1 Green J. S. 150 (under the influence of a statute), *contra*. Compare *Hapgood* v. *Houghton*, 10 Pick. 154.

For cases where the personal representative has neither requested nor ratified the funeral expenses, see *Patterson* v. *Patterson*, 59 N. Y. 574; *Hancock* v. *Podmore*, 1 B. & Ad. 260, 262.

RITTENHOUSE, ADMINISTRATOR, RESPONDENT *v.* P. H. AMMERMAN, APPELLANT.

64 Mo. 197. 1876.

APPEAL from Maries County Circuit Court.

NORTON, Judge, delivered the opinion of the court.

The defendant in this case was the executor of one James Johnson, deceased, and as such he procured Johnson and Rittenhouse, who were engaged in publishing a newspaper, to publish notices for the sale of his testator's land, and afterwards executed and delivered three several negotiable notes, payable to said Johnson and Rittenhouse, for such publication. The plaintiff, as administrator of the partnership estate of Johnson and Rittenhouse, instituted suit on said notes against defendant Ammerman, and obtained judgment against him. On the trial it was admitted that the estate of James Johnson was insolvent, and objection was made to the introduction of the notes in evidence, which was overruled, and judgment rendered against defendant *de bonis propriis*.

The questions presented for determination are: 1st. Is the defendant liable in his individual or representative capacity, and if liable, is there a sufficient consideration to support the promise to pay?

The individual liability of defendant is in a great measure to be determined from the character of the notes themselves. The following is a copy of one of them, the other two being like it in all respects except as to date, amount, and time of payment.

$15.00 VIENNA, Mo., June 13th, 1874.

Three months after date I promise to pay to the order of Johnson and Rittenhouse the sum of fifteen dollars for value received, negotiable and payable without defalcation or discount, and with interest from date, at the rate of ten per cent. per annum, and if the interest be not paid annually, to become as principal and bear the same rate of interest.

P. H. Ammerman.
Executor of last will of James Johnson, deceased.

It has been repeatedly held that an administrator can maintain an action in his own, individual name, on a note made payable to him "as administrator, etc.," or "as executor, etc."; the words "administrator, etc." being mere words descriptive of his office or title to be rejected as surplusage or as *descriptio personæ*.

No reason is perceived why this rule of construction should be departed from in the present instance, especially when the notes themselves contain no words indicating an intention or purpose to charge the assets of the intestate with their payment. If such had been the intention of the parties, or the maker of the note, it could

easily have been expressed on the face of the paper, and in the absence of such an expression it cannot be inferred.

The notes show that the amounts named therein were to be paid at a future day with a rate of interest agreed upon, with which the defendant had no right in his capacity of executor to charge the estate, by his own personal obligation. Such a writing from these facts alone appearing upon it might well be construed to be the personal undertaking of the executor. 2 Vol. Will. on Exec'r 1613. If the notes are to be regarded as the individual notes of the defendant, then it is said the promise to pay is without consideration. The notes import a consideration, and it was for the defendant to show that they were given without consideration. For this purpose it would have been competent for defendant to show that at the time the notices were published by Johnson and Rittenhouse at his request, the estate alone was to be looked to for the work done, and in the absence of such proof the publisher might well look to him for payment, and his promise to pay would be supported by sufficient consideration.

It is said in (1 Pars. Bills 161), that an administrator can only bind himself by his contracts; he cannot bind the assets of the deceased. If he make, indorse, or accept negotiable paper, he will be personally liable even if he adds to his own name the name of his office, as signing for example: "A. as an executor of B." for this will be only part of his description, or will be rejected as surplusage. But if he choose to exclude his personal liability expressly as by the words, "I promise to pay out of the assets of C. D. and not otherwise, then he is only bound as far as the assets extend." In the case at bar the executor could have limited his liability to the payment of the debt out of the assets of the estate. This, however, he has not done and the contract must be enforced as he has made it, and under it the only judgment which could have been rendered was a judgment *de bonis propriis.*

In the case of *Woodbridge* v. *Draper* 15 Mo. 327, an analogous principle is recognized. It is there held that when an administrator sues upon a contract where the cause of action accrued to the intestate during his lifetime, and fails in the action the judgment for costs will be *de bonis testatoris;* but where the cause of action accrues to the administrator after the death of the intestate, and he sues and fails to recover, judgment for costs will be rendered against him *de bonis propriis* in his personal character. In such case, however, on a proper showing to the probate court having the estate in charge, he may be allowed his costs out of the assets of the estate. So in the case at bar Johnson and Rittenhouse, the publishers, had a right to look to the executor for the costs of publishing the notices, and the executor a right to look to the assets of the testator. In this particular the case we are considering is distinguishable from the cases to which we have been cited; for in most of them the promise of the

executor or administrator related to the payment of debts created by the testator or intestate in his lifetime, and in such cases it has been held where there were neither assets, nor forbearance on the part of the creditor, the promise could not be enforced for want of consideration.

We think the judgment on the facts of the case was rendered for the right party and it will therefore be affirmed, which by the concurrence of the other judges is hereby done.[1]

GRAFTON NATIONAL BANK *v.* WING, ADMINISTRATOR.

GRAFTON SAVINGS BANK *v.* SAME.

172 Mass. 513. 1899.

HOLMES, J.[2] These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form: "Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

A majority of the court are of opinion that these words mean "Estate of Wheeler by Wing," and therefore that at least they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of Wing's name upon the paper and his failure to bind his supposed principal are not enough to make the contract his own. *Jefts* v. *York*, 4 Cush. 371, and 10 Cush. 392, 395, 396. *Abbey* v. *Chase*, 6 Cush. 54, 56, 57. *Taylor* v. *Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it. See further 1 Dan. Neg. Instr. (4th ed.) Secs. 306, 307, 308. *Bartlett* v. *Tucker*, 104 Mass. 336. It is true that it is suggested by Mr. Daniel that in such cases an ambiguous expression may be interpreted to bind the agent, but neither that suggestion nor a presumption that the agent knew the law can pervert words from their meaning if the meaning is plain. The

[1] *Christian* v. *Morris*, 50 Ala. 585; *Melone* v. *Ruffino*, 129 Cal. 514; *Taylor* v. *Mygatt*, 26 Conn. 184; *Lynch* v. *Kirby*, 65 Ga. 279; *Glisson v. Weil & Co.*, 117 Ga. 842; *Dunne* v. *Deery*, 40 Iowa 251; *Orne* v. *Ritchie*, 12 Phila. 231; *East Tenn. Iron Mfg. Co.* v. *Gaskell*, 2 Lea 742; *Rich* v. *Sowles*, 64 Vt. 408; *Farhall* v. *Farhall*, L. R. 7 Ch. 123, *accord*. Compare *Chouteau* v. *Suydam*, 21 N. Y. 179; *Daingerfield* v. *Smith*, 83 Va. 81.

[2] Only opinion is given.

so called presumption is a requirement, not a presumption of fact, and has no bearing or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained.[1]

WILLIS ET AL., RESPONDENTS *v.* SHARP, AS EXECUTOR, APPELLANT.

113 N. Y. 586. 1889.

ANDREWS, J. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This presents solely the question whether, upon the fact stated, a case was made for legal or equitable relief against the estate which he represents. The question whether other parties interested in the estate, either as creditors or as legatees or devisees, should have been joined as defendants does not arise. They will not be concluded except so far as the executor may be deemed to represent their interests, and the defendant, not having taken any objection on the ground of defect of parties, is deemed to have waived it. (Code, Sec. 499.)

It appears from the complaint that, on or prior to April 28, 1885, Fida C. Sharp died leaving a will or real and personal estate, whereby she devised and bequeathed all her property to Aurelius S. Sharp (her husband), and Elsie Sharp, as executors, in trust to apply the income therefrom, or such portion thereof as they should deem just, to the education, support and maintenance of her son Harry, until he should arrive at the age of twenty-five years, and then to divide the property and accumulations between her son and her husband, share and share alike, with cross remainders in case of the death of either prior to the time of division. She directed that after her death some legitimate business should be carried on by her executors for the benefit of her son Harry, and that her husband, the defendant, should be retained as manager thereof at a salary of $1,500 a year, and this was followed by a provision empowering her executors "to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require." Her husband and her son Harry were the sole beneficiaries under the will, there being no legacies or provisions in favor of any other persons, except that the testatrix directed that her debts and funeral and testamentary expenses should be paid as soon as practicable after her decease. The testatrix, at and for a long time prior to her death, was engaged in the merchant tailoring business in the city of New York, and after her death the same business was carried on by her husband, as executor, under the power contained in the will, he alone

[1] See *Germania Bank* v. *Michaud*, 62 Minn. 459.

having qualified as executor. Between the 15th of July, 1885, and the 15th of October, 1885, the plaintiffs sold and delivered to the defendant, as executor, for the purposes of said business, goods for the price and of the value of $1,380.73, which goods the complaint alleges were necessary for the conduct and carrying on of the business, and were purchased and used by the defendant for that purpose, and that "the estate of said Fida C. Sharp has had the full benefit thereof." It alleges that no part of the purchase-price of the goods, except the sum of $65, had been paid; that the defendant, individually, is irresponsible; and that the plaintiffs have no recourse for the payment of their debt, except the same can be paid out of the funds of the estate in the hands of the executor, which, it is alleged, are sufficient for that purpose, and that the defendant has neglected and refused on demand to pay for said goods. The relief demanded is a judgment against the executor, requiring him to pay the debt out of funds and property of the estate in his hands, and for general relief.

By the general rule the death of a trader puts an end to any trade in which he was engaged at the time of his death, and an executor or administrator has no authority *virtute officii* to continue it, except for the temporary purpose of converting the assets employed in the trade into money. *Barker* v. *Parker*, 1 T. R. 287; 2 Williams on Exrs. [7th ed.] 791. But a testator may authorize or direct his executor to continue a trade or to employ his assets in trade or business, and such authority or direction, if strictly pursued, will protect the executor from responsibility to those claiming under the will, in case of loss happening without his fault or negligence, and also entitle him to indemnity out of the estate, for any liability lawfully incurred within the scope of the power. *Burwell* v. *Cawood*, 2 How. [U. S.] 560; *Laible* v. *Ferry*, 32 N. J. Eq. 791; *Scott* v. *Izon*, 34 Beav. 434; *Lucas* v. *Williams*, 39 Gif. 150. The courts, while they have sustained with substantial unanimity the validity of a direction of a testator in his will that his trade should be continued, whether his business was that of a sole trader or of a firm of which he was a member, have applied stringent rules of construction in ascertaining both the existence and extent of the authority of the executor. In the first place, the intention of a testator to confer upon an executor power to continue a trade must be found in the direct, explicit and unequivocal language of the will or else it will not be deemed to have been conferred *Burwell* v. *Cawood*, *supra*; *Kirkman* v. *Booth*, 11 Beav. 273, and in the next place, a power, *simpliciter*, to carry on the testator's trade, or to continue his business in a firm of which he was a partner, without anything more, will be construed as an authority simply to carry on the trade or business with the fund already invested in it at the time of the testator's death, and to subject that fund only to the hazards of the trade and not the general assets of the estate. *Ex parte Garland*, 10 Ves. 119; *Cutbush* v. *Cutbush*, 1 Beav. 184; *Ex parte Richardson*, 1 Buck. 202; *M'Neillie* v. *Acton*,

4 De G., M. & G. 742. The property already embarked in the business is the trade fund, unless it appears from the will that the executor was authorized to use the general assets in the business. In every case where a trade is carried on by an executor under authority of the will, questions may arise as to the respective rights of existing and subsequent creditors, that is, creditors of the testator and creditors of the trade whose debts were contracted in the business carried on by the executor. The creditors of the testator, under our statute and the general rule of law for the administration of assets of a decedent, are entitled to have the assets collected in and applied upon their debts, a reasonable time being allowed for the ascertainment of the debts and the conversion of the assets. It would seem that a direction of the testator that his business should be continued would not be allowed to interfere with this right of existing creditors, or put to hazard the property of the testator applicable to the payment of their debts.[1] *Stanwood* v. *Owen*, 14 Gray, 195.) But this question is not presented by any facts appearing in this case. It does not appear that there were any debts owing by the testatrix at her death, or if there were such debts, that they have not been fully paid. The debt of the plaintiffs was contracted with the executor. It is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. *Austin* v. *Monro*, 47 N. Y. 360. It has been held in numerous cases that an executor, carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur this hazard, although authorized or directed to do so; but if he does carry it on, the contracts of the business are his individual contracts. *Ex parte Garland, supra; Fairland* v. *Percy*, L. R., 3 P. & D. 217; *Labouchere* v. *Tupper*, 11 Moore's P. C. 198; *Downs* v. *Collins*, 6 Hare, 418. If, in this case, there was in the will simply an authority or direction to the executors to carry on a trade, and in pursuance of the power the executor continued the existing business, we think, under the authorities cited, the plaintiffs could have no remedy, except to pursue the assets embarked in the trade at the death of the testatrix.[2] But, as said by Story, J., in *Burwell* v. *Cawood*, a

[1] *Morrow* v. *Morrow*, 2 Tenn. Ch. 549, *accord*. If the creditors of the deceased consent to the carrying on of the business, they are postponed to the creditors of the enterprise. *Dawse* v. *Gorton*, [1891] A.C. 190. See *Poole* v. *Munday*, 103 Mass. 174; *In re Oxley*, [1914] 1 Ch. 604; *Wright* v. *Beatty*, 2 Alberta 89.

[2] *Burwell* v. *Cawood*, 2 How. (U. S.) 560; *Pitkin* v. *Pitkin*, 7 Conn. 307; *Wilson* v. *Fridenberg*, 21 Fla. 386; *Frey* v. *Eisenhardt*, 116 Mich. 160; *Brasfield* v. *French*, 59 Miss. 632; *Laible* v. *Ferry*, 32 N. J. Eq. 791; *Ex parte Garland*, 10 Ves. Jr. 110; *In re Johnson*, 15 Ch. D. 548, *post*. p. 596, *accord*. Compare *Smith* v. *Ayer*, 101 U. S. 320; *Lucht* v. *Behrens*, 28 Ohio St. 231.

testator may, if he chooses, bind his general assets for all the debts of a business to be carried on after his death. Where this was the intention of the testator expressed in the will, then, in case of the insolvency of the executor, we see no reason to doubt that, in equity, the general assets become liable for the debts of the business. In *Fairland* v. *Percy supra*, Sir J. Hannan states the principle. He says: "Where a testator, by his will, directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who, after his death, become creditors of the business, in addition to the personal responsibility of the individuals who gave the order for the goods, or otherwise contracted the debt, are entitled in equity to claim against the estate to the extent that he authorized it to be used in that business." See *Owen* v. *Delamere*, L. R., 15 Eq. 134.

The provision in the will of Mrs. Sharp, empowering her executors to "sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require," indicates, we think, unmistakably, an intention on her part to subject her general assets to the debts of the business and to authorize the executor to contract debts therein binding her general estate. The executor could, unquestionably, have withdrawn from the assets money to purchase the goods, and a purchase on credit was, we think, a pledge of the general assets for their payment.

We are of the opinion that the complaint, on its face, stated a cause of action in equity, and we, therefore, affirm the judgment below.

All concur. *Judgment affirmed.*[1]

STANWOOD *v.* OWEN, ADMINISTOR.

SUYDAM *v.* SAME

14 Gray 195. 1860.

APPEALS from decisions of commissioners of insolvency appointed by the probate court of Suffolk, disallowing claims against the insolvent estate of William O. Moody, deceased, of which the appellee was administrator. The cases were submitted to the decision of the court upon the following facts:

Moody died on the 19th of April, 1855, having his domicil at Boston, and engaged in business on his separate account there, and being also partner in the firm of Harrod & Moody of New Orleans. After his decease, Harrod continued to carry on the business of that firm, by virtue of the following agreement, which was published in the New Orleans newspapers, and was also annexed to the articles of partnership (since destroyed by fire) of the former firm of Harrod, Crabtree & Moody, to which Moody contributed $10,000 capital:

[1] *Moore* v. *McCall*, 263 Ill. 596, *accord.*

"New Orleans, November 1, 1846.

"The subscribers, late partners of the firm of Harrod, Crabtree & Moody, doing business in the City of New Orleans, do agree to continue the business of the late firm under the name of Harrod & Moody, on the same terms and conditions as governed the late firm, and expressed in annexed document. And in case of the decease of either party, the business may be carried on by the survivor for one year (for the mutual benefit of both partners) from the day of said decease.

"Charles Harrod,
"W. O. Moody."

The firm of Harrod & Moody proved insolvent, and several of the unpaid partnership debts existing at Moody's death were allowed against his estate *pari passu* with his separate debts. But for the partnership debts, Moody's estate would have been solvent.

Stanwood's claim is upon a promissory note given by Harrod on the 25th of August, 1855, in the name of the firm of Harrod & Moody, for money and merchandise furnished to him after the death of Moody was known to both parties, and used by Harrod in the partnership business.

Suydam's claim is upon an account against Harrod & Moody, the first two items of which were contracted before, and the remainder after the death of Moody, as Suydam knew; and on which Harrod, since Moody's death, has paid a sum more than sufficient to discharge the first two items.

These cases were decided in June, 1860.

DEWEY, J. 1. The objections to the allowance of these claims as debts entitled to a *pro rata* distribution of the assets of the estate of William A. Moody, represented as insolvent, and admitted to be actually so if these claims are allowed, are, as it seems to us, quite insuperable. It would operate greatly to embarrass the obvious purpose of our legislation, having in view the speedy settlement of the estates of persons deceased, and the proper distribution of the assets among the various existing creditors.

Upon the decease of an individual, his assets, as then existing, are to be taken into the custody of the proper legal representative for administration. New adventures in business are not authorized, nor can any new liabilities be created, chargeable upon the assets. Contingent liabilities arising out of former transactions may exist, for which provision should be made, and these are recognized and provided for by our statutes. But beyond these the policy of our law is, that everything is to be adjusted upon the *status* of the property and liabilities then existing. The whole assets then applicable to the payment of debts are to be strictly applied to existing liabilities, absolute or contingent. The creditors of the deceased are not to have the payment of their debts postponed to await the result of future adventures by a surviving partner, over whom they have no

control. Whatever may be the effect of a stipulation of this character upon the claims of heirs at law for their distributive shares, or of legatees under a will of a testator who has made such a contract, the court are clearly of opinion that the claims of the creditors of the deceased partner, existing at the time of his death, are paramount to the claims of new creditors whose debts have accrued by reason of contracts made by the surviving partner, acting under such a stipulation for the continuance of the copartnership, and after full knowledge by such new creditors of the death of such former member of the firm. Such new creditors know full well with whom they trade, and to whom they give credit. They may resort to the surviving partner, and perhaps to the assets in his hands as surviving partner, but not to the private estate of the deceased partner in competition with creditors existing as such at the time of his death.

This precise question is a novel one in Massachusetts, and has not, so far as we know, been the subject of a judicial opinion. In the early history of the law in other countries, there will be found conflicting views as to the validity and effect of such contracts. It has been so on the mere question of the authority of the deceased partner to enter into a stipulation in favor of his heir, that he should be admitted into the partnership upon the death of the ancestor. The law, as held formerly on this subject, may be found fully stated in 3 Kent Com. (6th ed.) 56. We can readily perceive a distinction between the case where the heir asserts a right against a surviving partner to be admitted into the copartnership, and the case of a person who is seeking to enforce a claim against the deceased partner by reason of his contract with the surviving partner to continue the copartnership, and making such contract the basis of a claim to share *pro rata* with his creditors who were such at the time of the decease of such partner.

Cases have arisen upon provisions for such continuance of the copartnership contained solely in the testament of a deceased partner. To some extent certainly effect has been given to such provision, as in the case of *Hankey* v. *Hammock*, Buck, 210, and 1 Cooke B. L. 67. That case was supposed to be much qualified, if not overruled, by the case of *Ex parte Garland*, 10 Ves. 110, in which the evils of giving effect to such provisions are strongly stated by Lord Eldon, and a decided opinion expressed against allowing debts thus arising to be made a charge upon the general assets. See also *M'Neillie* v. *Acton*, 4 DeGex, Macn. & Gord. 752.

A similar opinion to that stated in *Ex parte Garland* was held by the supreme court of Connecticut in the case of *Pitkin* v. *Pitkin*, 7 Conn. 307, in which it was held, that the general assets of a deceased partner were not liable for debts of a creditor who became such after the death of the partner, although under the provisions of a will authorizing a continuance of the partnership after the decease of the testator. *Edgar* v. *Cook*, 4 Alab. 588, is to the like effect.

It is however often stated in books of authority, and held in adjudicated cases, that by virtue of an express agreement made between the parties, a partnership may be continued after the death of one of the parties. *Gratz* v. *Bayard*, 11 S. & R. 41. *Scholefield* v. *Eichelberger*, 7 Pet. 586. *Burwell* v. *Mandeville*, 2 How. 560. Story on Part. § 201. But there seems to be a strong disposition in the courts, in the cases cited, to confine the effects of such agreement to a lien upon the partnership assets.

Without going beyond this principle, or expressing any opinion further than upon the question arising upon the facts existing in the present case, the court are of opinion that the debts contracted after the death of Moody, and now sought to be allowed as debts to share *pro rata* in the estate of Moody with the debts existing against him at the time of his death, were properly rejected by the commissioners.[1]

2. In the second case the appellant seeks also to have allowed, as claims against the estate of Moody, the first two items of his bill or account, which were contracted in the lifetime of Moody. As to these, the administrator of Moody replies that they have been fully paid and discharged by moneys received and credited to the firm on account of payments by Harrod, the survivor. The question is merely one of application of the payments. The court are of opinion that they must be taken to be moneys realized by Harrod from the assets of the late firm in his hands, and generally on the account of Harrod & Moody, and must be applied to the oldest debts. Thus applied, the payments will exceed the two items.

Decisions affirmed.

[1] *Vincent* v. *Martin*, 79 Ala. 540; *Pitkin* v. *Pitkin*, 7 Conn. 307; *Brasfield* v. *French*, 59 Miss. 632; *Columbus Watch Company* v. *Hodenpyl*, 135 N. Y. 430; *Ex parte Richardson*, 3 Madd. 138, *accord*.

"The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after his death, whether he is entitled, or not entitled, to be wholly, or to any extent, indemnified by the testator's personal estate, and whether it is sufficient, or insufficient, for the purpose; nor does the propriety of his conduct, as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade becoming so after the death, the rights of creditors of the testator. It being immaterial also, as far as they are concerned, whether the testator, if he had a partner, was bound by a covenant with him, that his (the testator's) executors should continue the trade in partnership with the surviving partner. The latest authorities on the point are, we conceive, to this effect and appear to their Lordships preponderant and correct. A sufficient number of these authorities, including *Exp. Garland* (10 Ves. 110), *Exp. Richardson* (1 Madd. 138), and *Wightman* v. *Townroe* (1 Mau. & Sel. 412), were cited at the Bar during the argument." — *Per* Lord Justice Knight Bruce in *Labouchere* v. *Tupper*, 11 Moore P. C. 198, 221, 222. Compare *Lancaster* v. *Allsup*, 57 L. T. N. S. 52.

IN RE JOHNSON.

SHERMAN v. ROBINSON.

15 Ch. Div. 548. 1880.

ADJOURNED SUMMONS. Peter Johnson, by his will, dated the 27th of May, 1873, appointed the Defendant Robinson and another his executors: and, after making certain specific and pecuniary bequests, and directing the payment of his debts, and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in and receive all debts owing to him in respect of the business of a tailor and robe-maker then carried on by him at Cambridge, and also all other debts owing to him not connected with the business then carried on by him in London in partnership with Thomas Sadler, and (subject to the provisions thereinafter contained) to sell and convert into money all his Cambridge stock-in-trade, and stand possessed of the proceeds, and all other his personal estate and effects whatsoever (except his share and interest in the London business) not thereinbefore specifically bequeathed, upon trust to pay one equal fourth part thereof to and amongst such of the children of his deceased sister Catherine Neill (including his nephew John Neill) as should be living at the time of his decease; one other equal fourth part to the Plaintiff; and the remaining two fourth parts to the several persons therein named. And the testator declared that in case his nephew John Neill should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said John Neill, to postpone the sale of his Cambridge stock-in-trade and allow his said business of a tailor and robe-maker at Cambridge to be carried on by the said John Neill for his own benefit under the supervision of his said executors until such time as the said John Neill should attain twenty-one, and during such period should use such part of the share of the said John Neill in his residuary personal estate as might be requisite for the due carrying on of the said business. And he directed, in case that provision was carried into effect, that an inventory and valuation of all his stock-in-trade at Cambridge should be taken immediately after his decease, and that on the said John Neill attaining his age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation, and that if he declined to do so, and the said stock was sold, then the said John Neill should bring the amount of the proceeds of such sale into hotchpot on the calculation for the distribution of the residuary personal estate. The testator then gave certain directions as to the winding-up of his partnership in the London business, and directed that his share and interest therein should fall into his residuary personal estate.

The testator died on the 25th of November, 1875, and his will was proved by the Defendant Robinson alone, the other executor

having renounced. There were living at the testator's death two children of his deceased sister Catherine, one of whom was the said John Neill, then an infant.

After the testator's death the Defendant did not get in the book debts of the Cambridge business as directed by the will, but he continued to carry on the business in his own name until the 30th of June, 1878, when John Neill attained twenty-one: he also continued the management of the testator's share in the London business. For the purpose of carrying on the Cambridge business, the Defendant advanced from time to time several sums of money out of John Neill's share in the testator's personal estate, which sums were repaid out of the business in the ordinary course of carrying it on, but the Defendant kept no separate banking account for the business.

An action having been instituted by one of the residuary legatees, and a judgment obtained for the administration of the testator's estate, it was found, on taking the Defendant's accounts, that there was due from him a balance of £764 16*s.* 1*d.* in respect of profits from the Cambridge business, and also a balance of £1668 3*s.* 1*d.* in respect of the general personal estate of the testator, including his share in the London business.

Amongst the creditors who made claims against the estate under the judgment were several persons who had supplied the Defendant with goods in the course of his carrying on the Cambridge business subsequently to the testator's death, but these claims being disallowed by the Chief Clerk, summonses were taken out by three of these creditors for the purpose of establishing their claims. One of the summonses was by a firm of Standen & Co., woollen warehousemen, and asked that a sum of £460 5*s.* 10*d.* due to them for goods sold and delivered to the Defendant, the executor, in the course of his carrying on the trade or business of a tailor from the time of the testator's death down to the 30th of June, 1878, might be forthwith paid to them by the said executor out of the share of the said John Neill in the testator's residuary personal estate; or otherwise that it might be declared that the applicants were entitled to a lien on the portion of the estate of the said testator which on the 30th of June, 1878, was embarked in the carrying on as aforesaid of the said testator's business; and that an inquiry might be directed for the purpose of ascertaining what were the assets of the said testator which were subject to the lien of the applicants.

The two other summonses, which were by creditors for an aggregate amount of upwards of £600, asked that they might be at liberty to bring in their claims against the assets of the business carried on by the Defendant under the powers of the will, in respect of debts incurred by him to the applicants in the course of such business, and that such assets might be applied in payment of what should be found due to the applicants in respect of their debts. Upon the further consideration of the action all three summonses came on for hearing.

It appeared that the Defendant, the executor, was insolvent.

JESSEL, M. R. I shall dismiss these summonses, but I will give the creditors liberty to present a petition. I will not distribute the assets until they have presented a petition: that seems to me the regular course, but at present I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right course, for the creditors are not parties to this suit at all. They ought to come in under a petition. With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor — for it makes no difference — to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the Court puts the creditor, so to speak, as I understand it, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any Judge has said so.

If we start with *Ex parte Garland*, what Lord Eldon says is this, 10 Ves. 120: "It is admitted, they [the creditors] have the whole fund that is embarked in the trade" — that is, as between themselves and the executors the creditors can claim the application of the fund — "And in addition they have the personal responsibility of the individual with whom they deal: the only security in ordinary transactions of debtor and creditor." [His Lordship then read down

to the words "security for the creditors on the trade," Ibid. 121, and continued:—] Then, 10 Ves. 122, after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says, "If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons." That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is, Lord Eldon does not decide.

Then we have a case which I think comes nearest to the present case, *Ex parte Edmonds*, 4 D. F. & J. 488, Lord Justice *Turner* says this, 4 D. F. & J. 498: "The case of *Ex Parte Garland* and the other cases referred to in the argument have not, in my opinion, any application to the present case. They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read those two authorities, which, being the decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the point arises in any of the subsequent cases, or was the subject of consideration in them. *Owen* v. *Delamere*, Law Rep. 15 Eq. 134, which contains a mere *dictum* of Vice-Chancellor Bacon, but still of course entitled to great respect, if it did differ — which I do not think it does — from what Lord Justice Turner laid down in *Ex Parte Edmonds*, 4 D. F. & J. 488, as the true principle, would not be binding upon me; but I do not think it is different, because Vice-Chancellor Bacon is directing his attention to the point decided in *Ex parte Garland*, 10 Ves. 110, that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to: that is plain: for after saying that *Ex parte Garland* "contains a clear, distinct, and luminous exposition of law on the subject" — which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business — the Vice-Chancellor says, Law Rep. 15 Eq. 139, "The Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose." It is merely repeating *Ex parte Garland* without the slightest reference to the mode in which the claim is to be enforced.

The same may be said of the case of *Fairland* v. *Percy*, Law Rep.

3 P. & M. 217, I dispose of that by saying that Sir James Hannen goes no further, and that he does not consider the second point at all.

The question raised by the second point — that is, what is the right to resort — is not treated of, as far as I can see, in any reported decision except in the case of *Ex parte Edmonds*. I think it is inferentially referred to in Mr. Justice Lindley's book, where I think he means to say the same that Lord Justice Turner said, although I must say, with great deference to Mr. Justice Lindley, it might have been more clearly put. Nothing can be clearer than the way in which Lord Justice Turner puts it; it is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed; and the creditor is entitled to the benefit of that right.

What Mr. Justice Lindley says is this, Lindley on Partnership, 3rd Ed. p. 1103: — [His Lordship then read the passage commencing "If an executor of a deceased partner," and ending "lien on the assets of the deceased employed therein," and continued: —]

I am not sure that Mr. Justice Lindley had in view the remarks of Lord Justice Turner in *Ex parte Edmonds*, 4 D. F. & J. 488, for he does not cite the case; but he may have arrived at the same conclusion independently.

The only other text-book that I have been looking at on this point is the last edition of Williams on Executors, 8th Ed. p. 1798. After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says, "Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased." Then it says, page 1800, "The testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation." Although the author cites *Ex parte* Garland, 10 Ves. 110, he does not appear to me to deal directly with the question I have to deal with, which is, What is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade? I am therefore really thrown back on the authority of Lord Justice Turner. If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do get some additional benefit so as to avoid a supposed injustice; but the injustice to be avoided in the injustice of the *cestui que trust* walking off with the assets which have been earned

by the use of the property of the creditor: but where the *cestui que trust* does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the Court interfering at the instance of the creditors to give them a larger right than that they bargained for, namely, their personal right against the trustee. It appears to me, therefore, that if the trustee has no such right in such a case, they have none here.

The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the Cambridge business in his own name and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of Neill, during his minority; then Neill, on his attaining twenty-one, was to be allowed to take the stock-in-trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue; he kept no separate banking account so as to shew the actual sums of money used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now to inquire, but that is what he actually did. He carried on the business, and in carrying it on he received £764 16*s.* 1*d.* more profits than he has accounted for, and this amount he owes the estate. Besides that he was carrying on the London business belonging to the estate. From that and other sources he has received £1668 3*s.* 1*d.* more than he has accounted for; so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default.

Therefore unless the creditors can be in a position to shew — as to which there is no evidence before me — that there were profits from carrying on the business to an amount exceeding the deficit, so that something was gained by the use of these assets, it does not appear to me that they can be entitled to anything.

As the facts on this point do not appear, I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs.

The summonses are, therefore, dismissed without costs.[1]

[1] Compare *In re Frith*, [1902] 1 Ch. 342.

ESTATE OF SMITH.

118 Cal. 462. 1897.

TEMPLE, J. — This is an appeal by the executor from a decree settling the executor's third account and directing him to pay a certain family allowance. The decedent died testate October 17, 1892, having named Leon Sloss executor. Sloss qualified as executor November 16, 1892.

The testator left a vineyard in Fresno county of one hundred and twenty-five acres. The vines were four years old. The executor took possession and during the ensuing year — 1893 — expended in pruning, plowing, cultivating, and irrigating it $4,858.84.

During the year 1894 he expended for the same purposes $757.91, and in connection with the sale of raisins from the vineyard, for drayage, etc., $483.17. In his account for that year he charged the estate $242 for interest on moneys advanced by him.

In the year 1895 he expended for like purposes the sum of $168.50, making a total, including the charges for interest, $6,268.07.

May 31, 1894, an allowance was made to the widow of deceased of $150 per month from the death of decedent. At that time the executor had already expended $6,059.27 in caring for the vineyard.

In January, 1896, the widow caused the executor to be cited to show cause why he should not pay out of the funds in his hands the accrued allowance. The executor had a few days previously filed his third annual account, which he designated his final account, and asked leave to resign his trust. To the citation he answered that he had no funds with which to pay the allowance, and the matter of the petition and the account were heard together.

The executor has received from the vineyard for the raisins $2,246.78, and as rent $1,000.

The court found that no more was spent on the vineyard than was necessary for pruning, plowing, cultivating, and irrigating the same; "that a vineyard in Fresno county requires irrigation every year; that it is necessary for the preservation of the vines that they should be pruned and the land plowed, cultivated, and irrigated every year. Should they not be pruned and the land plowed, cultivated, and irrigated every year, the minimum damage would be that the vineyard would be set back three years, and the maximum damage under these conditions would be that the vines might die altogether."

The court further found that none of the expenditures were an expense of the administration or a charge against the estate, "but the matter of said items and of the said advances may without prejudice be left for a final accounting in the matter of said estate, at which time all the circumstances proper to be considered may more

properly arise, and particularly the question of loss or benefit to the estate."

In the decision it was adjudged: "That said amended third (also styled final) account be and it is settled and allowed as follows, viz: That the said executor, Leon Sloss, is chargeable, and is hereby charged, with a balance of moneys in his hands of five thousand eight hundred and forty-eight dollars and 90-100 ($5,848.90), as of November 7, 1895, and with the real property and premises in the inventory and appraisement on file herein; and that the following items of said amended third account be and are rejected and stricken out, namely: 'November 6. Balance due Leon Sloss for advances, $661.52'; and 'January 1. Balance due Leon Sloss for advances and expenses of administration, as per second annual account, $4,100.91.' Provided, however, that as to the items referred to in said decision as vineyard items, the same may be presented by the executor, at his option, for the future consideration of the court upon the final settlement herein, or at such future time as may be deemed proper or expedient."

If the expenditures upon the vineyard were properly made, the executor had no money in his hands belonging to the estate. The court also charged the executor with the sum of $3,246.78 received from the vineyard. The same decree directed the executor to pay to the widow out of the money so found in his hands the sum of $5,575, the amount of the family allowance which had then accrued.

The parties have stipulated that the evidence is as indicated by the findings, the appellant only reserving the right to claim that certain findings of fact are conclusions of law. Possibly this stipulation does not do justice to the probate court. Our decision, however, must rest upon this basis.

Upon this evidence there can be no doubt that the court erred in refusing to give the executor credit for the money received from the vineyard. It is quite manifest that nothing would have been realized either from the sale of raisins or rents for the year 1895 if the vineyard had not been kept up. It is suggested that it does not appear that this vineyard might not have been rented and kept up without expense to the estate. It being admitted that the expenditures were necessary to prevent the vines from being destroyed, the presumption is that the executor has acted in good faith, unless proof was made that he knew he could have caused the vineyard to be preserved at less expense.

The primary purposes and reason for administration of an estate are: 1. To preserve the estate until distribution can be made; and 2. To pay the debts of decedent. In *In re Moore*, 57 Cal. 437, the court stated the different objects to which the assets of an estate may be applied. In that view the statement is accurate. It was not an attempt to state why an administration is necessary. It would

be absurd to say that the object of administration is to pay the expense of administration, nor did the court intend to say so. All other matters are incidental, and made proper because of administration, the necessity for which is as I have stated.

The expenses of administration must, in the nature of things, have priority in the order of payment. The executor cannot be compelled to pay them from his personal assets, but may apply the money in his hands belonging to the estate to that purpose. The will is not in the record, and there is nothing to show that there are any special funds in the estate. All are subject to the payment of expenses. The sources from which they have been derived are immaterial. Even if the expenditures were unauthorized, and the court should find that the money expended in the preservation of the vineyard was an unlawful use of the funds, the executor would be entitled to credit for the money received from the vineyard. The rule as to the unlawful employment of the funds of the estate is quite simple. The estate is to suffer no loss, and the executor is to make no gain. This does not mean that the executor is to be charged for all money invested in the speculation, and also with all that is received from it, but only that he must make good the loss resulting from the business, or if a profit has been earned that he must account for it to the estate. The failure to give the executor this credit was, no doubt, an inadvertence.

And I think it was improper to order the executor to pay the allowance, reserving the question as to the propriety of the disbursements. If the money was expended properly for the preservation of the property of the estate, the order in effect required the executor to advance the money from his own funds. The court has no power or right to declare, if the money was so expended, that the executor has money in his hands as executor. If the expenditure was necessary, it was the duty of the executor to apply the funds in his hands as executor to that end, and, having so done, he cannot still have the money.

It is the duty of the executor, without special direction of the court, to preserve the property of the estate, and he does not require leave of the court so to do, and it is a question how far an order so obtained will protect an administrator either in doing or in omitting to do something which might be deemed important. When court is so consulted the heirs are not specially cited, but on the settlement of the accounts of an executor they are called in and have a right to question the acts of the executor and to have an appeal to this court upon any determination which may be made. The previous consent to the acts of the executor cannot limit their inquiry as to the lawfulness of the acts done or the duty of the executor to do that which has been omitted. Ordinarily, it would determine the question of good faith, and quite often that is the only matter in issue. Hence, it is always an advantage to have such permission. Still, the failure

to obtain it does not render the expenditures made improper. The only result is, that the matter is yet to be passed upon.

The question as to whether the expenditures made were necessary has not yet been determined by the probate judge, and we are not called upon to decide the question now. He might find that they were not necessary, or that manifestly the property was not worth the cost of preservation, and that the executor did not act in good faith in the matter. Had the vineyard been but one year old, for instance, a very different question would have been presented. So I think it an important matter that the estate was not fully administered within the year. The will is not before us. If it made it necessary to protract the administration for a number of years the problem would be quite different. Ordinarily, an administrator should not manage either a vineyard or a farm at the risk of the estate. When the estate is settled, as it should be, within the year, this is a small matter, and we may presume a tenant for a vineyard for that short time could not be had.

The estate seems to be solvent. Otherwise the allowance could only be made for one year. That being so, I do not see what difference it makes that the vineyard is mortgaged. What the mortgagee does not get from the security he will get from the estate. The interest of the heirs, therefore, is to have the property preserved. Whether the duty of the executor would be different if the estate were insolvent we are not called upon to determine.

The court also reserved its conclusion as to the matter of the estoppel. Very likely there will be no occasion to determine it.

I find nothing in the matter of the *Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531, or in *Tompkins* v. *Weeks*, 26 Cal. 50, at variance with the views here expressed. Authority to the effect that an executor may not invest the funds of the estate in an outside venture is not authority upon which it can be held that an executor must not preserve the property which has come to his hands as executor. The last is his duty before all others. For any failure here he will be held liable. No other case cited seems to bear upon any issues raised here.

The decree is reversed and the cause remanded for further proceedings.[1]

McFARLAND, J., and HENSHAW, J., concurred.

[1] *Estate of Fernandez*, 119 Cal. 579; *Estate of Hinchcon*, 159 Cal. 755; *Gilman* v. *Wilbor*, 1 Dem. Sur. 547; *Merritt* v. *Merritt*, 62 Mo. 150; *Tuttle* v. *Robinson*, 33 N. H. 104, 114; *Cornwall* v. *Deck*, 2 Redf. Surr. 87; *Whiteley* v. *Alexander*, 73 N. C. 444; *Bowker's Estate*, 12 Phila. 88; *Allen* v. *Shanks*, 90 Tenn. 359; *Newton* v. *Poole*, 12 Leigh 112; *Beggs* v. *Behrend*, 156 Wis. 34; *Garrett* v. *Noble*, 6 Sim. 504, *accord*. Compare *McLeod* v. *Griffis*, 45 Ark. 505; *Collinson* v. *Lester*, 20 Beav. 356, 365, 366. For cases under statutes, see *Pinckard* v. *Pinckard*, 24 Ala. 250; *Lawton* v. *Fish*, 51 Ga. 647; *Stephens* v. *James*, 77 Ga. 139; *Percival* v. *Herbemont*, 1 McMul. 59; *Reinstein* v. *Smith*, 65 Tex. 247; *Stoughton Wagon Co.* v. *Dreyfus Co.*, 181 S. W. (Tex.) 703.

MACDONALD, TRUSTEE ET AL., PLAINTIFFS AND RESPONDENTS, *v.* O'SHEA, ADMINISTRATOR, etc., DEFENDANT, WALSH ET AL., DEFENDANTS AND APPELLANTS.

58 Wash. 169. 1910.

PARKER, J.[1]— This is an action to foreclose an indemnity mortgage. A trial resulted in findings and judgment in favor of the plaintiffs, and certain of the defendants have appealed.

The material facts are, in substance, as follows: The National Surety Company is a corporation authorized to transact the business of surety in this state. On April 27, 1905, John J. Walsh executed and delivered to E. C. Macdonald, as trustee for the National Surety Company, a mortgage upon real property in Spokane, which mortgage by its terms was given to secure the sum of $3,500. This mortgage was intended to indemnify the surety company against any damage or loss which it might incur upon any bond thereafter executed by it at the request or for the benefit of John J. Walsh. On May 25, 1906, at the instance and request of John J. Walsh, the surety company executed and delivered its bond as surety in his behalf in favor of the Standard Furniture House, incorporated, in the sum of $7,500, whereby the surety company guaranteed that he would well and truly perform a certain building contract for the construction of a building, entered into on that day by him with the Standard Furniture House. By the terms of the building contract he was to furnish all material and labor for the erection and completion of the building, according to certain plans and specifications, at an agreed compensation of $15,050.75, and was to protect the property against all claims and liens occurring by reason of the construction of the building. It was provided in the contract that "The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained."

On July 21, 1906, John J. Walsh died. At that time a comparatively small part of the contract had been performed. Soon thereafter Edward O'Shea was appointed and duly qualified as administrator of the estate of John J. Walsh. The administrator, under the sanction of the court, proceeded with the construction of the building under the contract made by the deceased. Thereafter the administrator defaulted in the performance of the contract, in that he suffered and permitted liens to be filed against the property, and neglected to pay certain bills for material and labor used in its construction, amounting in the aggregate to $3,492.40. These claims were all lienable claims against the property, though not all of the claimants had actually filed liens. Thereupon the Standard Furni-

[1] Part of the opinion is omitted.

ture House demanded that the surety company save it harmless from these claims. Thereupon the surety company, after investigating the claims and being satisfied of their validity, and that it was liable as surety upon the bond for their payment, complied with the demand of the Standard Furniture House and paid the claims on February 14, 1907. The appellants are heirs of John J. Walsh, and as such are interested in the mortgaged property. The court concluded that the claims paid by the surety company were valid claims against John J. Walsh, and the surety company as surety, upon the contract and bond; and that the surety company, by virtue of its indemnity mortgage, was entitled to have the sums so paid by it declared a lien upon the property described in the mortgage, and to have the mortgage foreclosed.

Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between him and the Standard Furniture House that his obligation under the contract to construct the building did not survive but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims, accruing after the death of Walsh, in the construction of the building. The general rule governing the survival of contractual obligations, as against the personal representative and the estates of deceased persons, is stated in 2 Parson's on Contracts (9th ed.), 685, as follows:

"It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, although not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract;[1] as where the thing to be done required the personal skill of the testator himself." See, also, 18 Cyc. 239.

This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. The supreme court of Pennsylvania in *Billings' Appeal*, 106 Pa. St. 558, 560, said:

"Where a party agrees to do that which does not necessarily re-

[1] *Janin* v. *Browne*, 59 Cal. 37; *Cummins* v. *Pond*, 109 Ind. 71; *How* v. *How*, 48 Me. 428; *Jackson* v. *O'Brannin*, 14 Ohio St. 177; *Siboni* v. *Kirkman*, 1 M. & W. 418; *Wentworth* v. *Cock*, 10 A. & E. 42, *accord*. Compare *Oliver* v. *Morgan*, 10 Heisk. 322; *Denton* v. *Sanford*, 103 N. Y. 607; *Marshall* v. *Broadhurst*, 1 Cr. & J. 403. But see *Chicago Lumber Co.* v. *Tomlinson*, 51 Kan. 770.

quire him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true, also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of *Dickinson* v. *Calahan's Administrator*, 7 Harris, 227, to have intended its dissolution at death. The whole question, in each case, is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general."

In the case before us there is no doubt of the intent of the parties to make this building contract binding upon the administrator of John J. Walsh as his personal representative in the event of his death before the completion of the building, since the contract by its express terms so provides. Therefore the administrator was bound to complete the performance of the contract in so far as the assets of the estate would permit, unless we can say that the building contract imposed upon John J. Walsh such a personal duty as to render it practically impossible of performance by any one but himself. An exhaustive note citing many authorities relating to this subject may be found in 21 L. R. A. (N. S.) 915 (*Mendenhall* v. *Davis*, 52 Wash. 169, 100 Pac. 336). See, also, note in 68 American Decisions, 760 (*Hawkins* v. *Ball's Adm'r*, 18 B. Monroe 816). It is clear that the obligation of deceased under this building contract was that of an independent contractor and was not a matter of rendering personal service. 16 Am. & Eng. Ency. Law (2d ed.), 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building, or any part thereof, when completed should be the product of his own personal labor or skill, either as laborer, mechanic or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death; while there is eminent authority to the contrary. Judge Woerner in his American Law of Administration (2d ed.), Sec, 328, says:

"If one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original

contract, so that a sub-contractor is entitled to his lien for materials furnished the intestate."

See, also, 3 Williams, Executors (7th Am. ed.), 224. Both of these eminent text writers cite in support of their text, among other authorities, the early English case of *Quick* v. *Ludborrow*, reported in 3 Bulstrode's Reports, 30, in the year 1659, in which Coke, Chief Justice, said: "If a man be bound to build a house for another before such a time, and he which is bound dies before the time, his executors are bound to perform this." The following cases relating to building contracts support this view: *Kadish* v. *Lyon*, 229 Ill. 35, 82 N. E. 194; *Janin* v. *Browne*, 59 Cal. 37; *Riblet* v. *Wallis*, 1 Daly 360, 365; *Bambrick* v. *Webster Groves Presbyterian Church Ass'n*, 53 Mo. App. 225, 238; *Russell* v. *Buckhout*, 87 Hun 46, 34 N. Y. Supp. 271.

We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person. . . .

We are of the opinion that the judgment should be affirmed, and it is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

NOTE ON POWER OF THE PERSONAL REPRESENTATIVE TO REVIVE A DEBT BARRED BY THE STATUTE OF LIMITATIONS

"IN ENGLAND. If an executor pays a debt justly due from his testator, but barred by the Statute of Limitations, he is not guilty of a *devastavit*, *Lowis* v. *Rumney*, L. R. 4 Eq. 451 (1867); and in a suit subsequently brought for the administration of the estate such payment will be allowed him, *Hunter* v. *Baxter*, 3 Giff. 214 (1861), even against the devisees of the real estate upon whom other debts are in consequence thrown, *Lowis* v. *Rumney*.

"But an acknowledgment by an executor will not keep a debt alive so that it can be proved directly against an heir or devisee, *Putnam* v. *Bates*, 3 Russ. 188 (1826). See also *Briggs* v. *Wilson*, 5 De G. M. & G. 12 (1854). And in *Fordham* v. *Wallis*, 10 Hare, 217 (1852), it was *held* that a simple contract debt which had been kept alive against the personalty by the conduct of the executors, was not entitled under the doctrine of marshalling to stand in the place of specialties against the real estate; but this seems opposed to *Lowis* v. *Rumney:* and see Darby & Bos. Sts. of Lim. 87–90.

"An executor may retain a debt due to himself from the testator though barred by the Statute, *Hill* v. *Walker*, 4 K. & J. (1858); and this right is not lost by failure to assert it before a decree in an administration suit, *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415 (1853).

"But after decree in an administration suit, the executor, except as to his own debt, loses his right to waive the defence of the Statute, *Phillips* v. *Neal* (No. 2), 32 Beav. 26 (1862); and the defence of the Statute may be insisted upon, either by the residuary legatee, *Shewen* v. *Vanderhorst*, 1 Russ. & Myl. 347 (1831); *Moodie* v. *Bannister*, 4 Drew. 432 (1859); or by another creditor, *Fuller* v. *Redman* (No. 2), 26 Beav. 614 (1859). But if the administration suit has been brought by a creditor, the plaintiff's debt is not open after decree to an objection that it is barred under the Statute, made either on behalf of the residuary legatee, *Briggs* v. *Wilson*, *ubi sup.*, or of a creditor, *Fuller* v. *Redman* (No. 2).

"But in an administration suit, if neither the executor nor any one beneficially interested in the estate interpose the bar of the Statute to any claim, the court will not interfere *mero motu*, *Alston* v. *Trollope*, L. R. 2 Eq. 205 (1866). And in *Combs* v. *Combs*, L. R. 1 P. & D. 288 (1866), administration was granted to a creditor whose debt was barred by the Statute." 4 Gray, Cas. on Prop. (2d ed.), p. 561.

In America. In the following cases it was held that a new promise or an acknowledgment by an executor or administrator would remove the bar of the Statute of Limitations and bind the estate anew to the same extent as if made by the debtor himself. *Towner* v. *Ferguson*, 20 Ala. 147; *Chambers* v. *Fennemore*, 4 Har. (Del.) 368; *Trimball* v. *Marshall*, 66 Iowa 233; *Northcutt* v. *Wilkinson*, 12 B. Mon. 408; *Quynn* v. *Carroll*, 10 Md. 197, 209; *Fledderman* v. *Fledderman*, 112 Md. 226, 249 (*semble*); *Foster* v. *Starkey*, 12 Cush. 324 (*semble*); *Slattery* v. *Doyle*, 180 Mass. 27 (*semble*); *Preston* v. *Cutter*, 64 N. H. 461; *Schreve* v. *Joyce*, 36 N. J. L. 44; *Hewes* v. *Hurff*, 69 N. J. L. 263; *Heath* v. *Grinnell*, 61 Barb. 190; *McLaren* v. *McMartin*, 36 N. Y. 88; *Walter* v. *Radcliffe*, 2 Desaus. 577.

In the following cases, however, the personal representative was held, occasionally by reason of a local statute, to have no such control over the Statute of Limitations. *Thompson* v. *Peter*, 12 Wheat. 565; *Vrooman* v. *Li Po Tai*, 113 Cal. 302; *Peck* v. *Botsford*, 7 Conn. 172; *Goodhart* v. *State*, 84 Conn. 54; *Gailey* v. *Washington*, 2 Har (Del.) 204; *Paterson* v. *Cobb*, 4 Fla. 481; *Hanson* v. *Towle*, 19 Kan. 273; *Succession of Romero*, 31 La. Ann. 721; *Succession of Driscoll*, 125 La. 287; *McHugh* v. *Dowd*, 86 Mich. 412; *In re Mouillerat's Estate*, 14 Mont. 245; *Sanders* v. *Robertson*, 23 Miss. 389; *Huntington* v. *Bobbitt*, 46 Miss. 528; *Bambrick* v. *Bambrick*, 157 Mo. 423; *Butler* v. *Johnson*, 111 N. Y. 204, 212, 218; *Fritz* v. *Thomas*, 1 Whart. 66; *Clark* v. *Maguire*, 35 Pa. 259; *Moore* v. *Hardison*, 10 Tex. 467; *Smith* v. *Pattie*, 81 Va. 654; *Bank of Montreal* v. *Bucanan*, 32 Wash. 480; *Stiles* v. *Laurel Co.* 47 W. Va. 838; *O'Keefe* v. *Foster*, 5 Wyom. 343, 354. Compare *Steele* v. *Steele*, 64 Ala. 456; *Lee* v. *Downey*, 68 Ala. 98.

There are jurisdictions, including some of those just cited, in which a personal representative has the power to start the Statute running afresh if the debt is not already barred. *Marietta Bank* v. *Jones*, 66 Ga. 286; *Holmes* v. *Bartlett*, 160 Ill. App. 443; *Succession of Patrick*, 30 La. Ann. 1071; *Holly* v. *Gibbons*, 176 N. Y. 520. Compare *Johnson* v. *Ballard*, 11 Rich. L. 178; *Divine* v. *Miller*, 70 S. C. 225 (*semble*).

In other states it would seem that the personal representative has no control over the Statute of Limitations whether it has run or not. *Dern* v. *Olsen*, 18 Idaho 358 (statute); *Forney* v. *Benedict*, 5 Pa. 225; *Estate of Claghorn*, 181 Pa. 600, 608; *Stiles* v. *Laurel Co.*, 47 W. Va. 838; *Findley* v. *Cunningham*, 53 W. Va. 1.

An executor or administrator may not retain for a debt which is barred by the statute due to himself from the testator. *Rogers* v. *Rogers*, 3 Wend. 503; *Hoch's Appeal*, 21 Pa. 280; *Batson* v. *Murrell*, 10 Hump. 301. See *Haskell* v. *Manson*, 200 Mass. 599. *Baker* v. *Bush*, 25 Ga. 594, *contra*. See *Preston* v. *Cutter*, 64 N. H. 461.

Upon application to sell land for the payment of debts the heir is not bound by conduct of the executor or administrator in affecting the statute as to the personal estate. *Steele* v. *Steele*, 64 Ala. 438; *Lee* v. *Downey*, 68 Ala. 98; *Riser* v. *Snoddy*, 7 Ind. 442; *Adams* v. *Fassett*, 149 N. Y. 61, 66; *Bevers* v. *Park*, 88 N. C. 456; *Divine* v. *Miller*, 70 S. C. 225. *Hodgdon* v. *White*, 11 N. H. 208, *contra*. Compare *Speer* v. *James*, 94 N. C. 417.

On a creditor's bill for the administration of the estate each creditor may dispute the claim of any other creditor, and so may claim that the statute has run against another. *Wordsworth* v. *Davis*, 75 N. C. 159. Compare *Matter of Kendrick*, 107 N. Y. 104; *Kittera's Estate*, 17 Pa. 416; *Ritter's Appeal*, 23 Pa. 95; *Bates* v. *Elrod*, 13 Lea 156.

If a single personal representative may start the statute running afresh, one of several may so bind the estate. *Northcut* v. *Wilkinson*, 12 B. Mon. 408; *Shreve* v. *Joyce*, 36 N. J. L. 44; *Heath* v. *Grenell*, 61 Barb. 190. *Petts* v. *Wooten*, 24 Ala. 474, *contra*.

In most of the United States there are statutes requiring creditors to present their claims to the Probate Court within a limited time. Personal representatives have in general no power to dispense with these statutes.

EWER *v.* CORBET.

2 P. Wms. 148. 1723.

One possessed of a term of years, devised it to A. and died indebted, having made B. his executor.

The executor sold the term, upon which the devisee of the term brought a bill against the purchaser, insisting, that the term being devised to the plaintiff, the executor was but a trustee for him, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust.

Master of the Rolls. [Sir Joseph Jekyll.] I remember it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of major *Bill* v. *Humble*, 2 Vern. 444.

But since that, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy, but against the executor, to recover the value thereof, if there be sufficient assets for the payment of debts.

As for the notice of the will, and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice, so that if notice were to be an hindrance, then of consequence, no executor might sell.

It is not reasonable to put every purchaser of a lease from an executor, to take an account of the testator's debts; nor has he any means to discover them.

On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (*inter alia*) of necessity be liable, and therefore may be sold by the executor.

If equity were otherwise, it would be a great hindrance to the payment of debts and legacies; and would lay an embargo upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences.

I admit, if an executor should sell a term for an undervalue, or to one who has notice that there are no debts, or that all the debts are paid, this might be another consideration: but there being no such ingredient in the present case,

Dismiss the bill.[1]

[1] See *Walker* v. *Craig*, 18 Ill. 116; *Gray* v. *Armistead*, 6 Ired. Eq. 74; *Tyrrell* v. *Morris*, 1 Dev. & B. Eq. 559; *Jelke* v. *Goldsmith*, 52 Ohio St., 499; *Sneed* v. *Hooper*, Cooke (Tenn.) 200; *Hadley* v. *Kendrick*, 10 Lea 525; *Brockenbrough* v. *Turner*, 78 Va. 438; *Munteith* v. *Rahn*, 14 Wis. 210; *Cole* v. *Miles*, 10 Hare 179.

The plaintiff recovered judgment against the defendant, executrix of her husband, on a bill of exchange accepted by the testator. She then assigned goods of the estate to trustees for the benefit of the testator's creditors. It was held that this assignment was good against the judgment creditor. *Wolverhampton and Staffordshire Banking Co.* v. *Marston*, 7 H. & N. 148.

CRANE *v.* DRAKE ET AL.

2 Vernon 616. 1708.

FRANCIS HOOPER, being indebted to the plaintiff £100 on bond, died possessed of a great personal estate, and made his brother William executor and devisee, who wasted the estate: the defendant Drake, having notice of the plaintiff's debt, buys of William, the executor, a leasehold estate by discounting £200 due from the testator, £550 due from the executor, and by payment of £150 in money.

Plaintiff's bill was to have satisfaction for his debt out of the leasehold estate, being part of the testator's assets.

Question was, whether this was a good sale to bind a creditor.

For the defendant it was insisted, that an executor may sell, and with the money, when he has it, may pay his own debts; and for the same reason he may upon sale discount and allow the purchaser the debt he owes him; and the rather in this case, because he paid £150 in money with which the executor might have paid the plaintiff's debt; yet decreed for the plaintiff at the Rolls, and affirmed on an appeal to the Lord Chancellor, he saying the defendant was a party, and consenting to and contriving a *devastavit*.[1]

LYMAN, ADMINISTRATOR *v.* NATIONAL BANK OF THE REPUBLIC.

181 Mass. 437. 1902.

HOLMES, C. J. This is a bill brought by the administrator *de bonis non* of the will of Isaac N. Tucker, to compel the surrender of certain stock and bonds alleged to have been pledged unlawfully by the former executrix of the same will. The advance for which the pledge was given was made by the bank in good faith and placed to the credit of the estate. Afterward it was drawn out by the executrix upon a check to her own order. The money was applied to her private use, but this was without the privity of the defendant. The form of the check gave no notice of her intent to misapply the funds and imposed no duties on the bank. Some stress is laid on the statement in the agreed facts that the son of the executrix "applied in her name" for the loan, but the loan necessarily was made to her and it is plain that the president of the bank understood that it was for the benefit of the estate, or, according to popular phraseology, that it was made to the estate. The bill is based on a general allegation of illegality, and the only question necessary to be considered under

[1] See *Smith* v. *Ayer*, 101 U. S. 320, 327; *Cox* v. *Bank*, 119 N. C. 302; *Garnett* v. *Macon*, 6 Call 308; *Doe. d. Woodhead* v. *Fallows*, 2 C. & J. 481.

either the bill or the evidence is the general one whether an executor has power to pledge the assets of the estate. This power is so fully established as an incident of his absolute control over the property that it is not necessary to do more than to cite a few of the cases. *Carter* v. *National Bank of Lewiston*, 71 Maine, 448; *Smith* v. *Ayer*, 101 U. S. 320, 326; *Scott* v. *Tyler*, 2 Dick. 712, 725; *M'Leod* v. *Drummond*, 17 Ves. 152, 154; *Russell* v. *Plaice*, 18 Beav. 21, 26; *Earl Vane* v. *Rigden*, L. R. 5 Ch. 663, 668, 670; 1 Wms. Ex. (9th ed.) 802, 803. Of course the contract of borrowing can bind the executor only personally in the first instance, but that is due to the fact that the estate as such is not a person and that the executor cannot contract otherwise. *Durkin* v. *Langley*, 167 Mass. 577, 578. See *Sumner* v. *Williams*, 8 Mass. 162. Compare *Mason* v. *Pomeroy*, 151 Mass. 164. The fact that it is in that form does not invalidate the pledge. See *Farhall* v. *Farhall*, L. R. 7 Ch. 123, 125.

It is said that the defendant was charged with notice of the contents of the will. If this be so, there is nothing in the will to cut down the power of the executrix. This property was part of the residue, and although the will provided that after the death of the executrix the residue should be held upon certain trusts, that fact did not limit her official authority. She did not act by virtue of her interest in the fund or as trustee, but under her prior and paramount title as executrix. Whether the gift of the testator's business enlarged her powers need not be considered. As we are of opinion that the plaintiff has no case on the merits, it is unnecessary to discuss anything else.

Bill dismissed.[1]

TOMLINSON AND OTHERS *v.* SMITH.

Finch 378. 1678.

WILLIAM ADAMS the father of the plaintiffs Mary, Anne, and Joan, being possessed of a term for years of an inn called the Black Horse Inn, situate in St. Thomas Street in Bristol, did about the year, 1654, by his last will devise the same to his son Roger Adams for ten years after the decease of his wife, or change of her widowhood, and after the expiration of the said ten years, then he devised the residue of the said term to his said 3 daughters Mary, Anne, and Joan, equally to be divided amongst them, or to such of them as should be then living, and made his wife Anne sole executrix, *who assented to the said legacies*, and entered and enjoyed the premises during her life; and died about 12 *years* since, about which time there was 18 *years* of the said term to come and unexpired.

[1] *Carter* v. *Manufacturers' Bank of Lewiston*, 71 Me. 448; *Hemmy* v. *Hawkins*, 102 Wis. 56, *accord*. Compare *Russell* v. *Plaice*, 18 Beav. 21; *Vane* v. *Rigden*, L. R. 5 Ch. 663; *Attenborough* v. *Solomon*, [1913] A. C. 76.

After the death of the said Anne, the defendant Richard Smith purchased the interest of the said Roger in this inn, having before purchased the *inheritance;* and after the said ten years were expired, the plaintiffs entered as devisees by the said last will of their father William Adams, and exhibited a bill to have an account, &c., and that the remainder of the said term might be decreed to them.

But the defendant refused to give them possession, claiming the premises by virtue of an *assignment* of the said term to him by Anne *the executrix* of William Adams, in consideration of £150 which he paid to her, the better to enable her to discharge the debts of the said testator, she *not having sufficient assets* for that purpose; and thereupon she delivered up to the said defendant Smith *the original lease;* and that since he entered, he hath laid out several sums of money in the necessary repairing the said inn.

And that since the plaintiffs have charged, that the said Anne the *executrix did assent to their legacies,* they have a proper remedy at law notwithstanding the said *assignment;* and therefore he insisted by his counsel, that they ought not to have any relief in this court.

But the court being satisfied, that the said Wm. Adams left sufficient assets to pay his debts; and that Anne *the executrix did assent to the said legacies,* decreed to the plaintiffs the residue of the said term; and that the defendant should account to them for the rents and profits over and above the rent reserved in the original lease, from the expiration of the ten years, during the remainder of the said term, according to the value thereof, when the defendant first entered, in case the plaintiffs will accept it.

But if the plaintiffs shall insist to have the account taken according to the present value, then the master to take an account of what money the defendant hath laid out for the necessary repairs and improving the premises; and in taking the said account he is to have respect as well to the interest of the said Anne, and to the term of ten years which Roger had in the same, as to the plaintiff's interest, and also to the inheritance; and to allow the defendant proportionable shares of all such money by him laid out in repairs and improvement of the rent, out of the money that shall be coming to the plaintiffs.

But if the plaintiffs will accept the account according to the value of the said inn, at the time when the defendant entered, then the master is only to examine what that value was, and accordingly to take the account, and to certify what will be thereupon due to the plaintiffs, &c.[1]

[1] See 1 Coote, Mortgages (8th. ed.), p. 405; 1 Williams, Exec. (10th ed.), p. 701 note h.

WICKERSHAM, Respondent *v.* JOHNSON, Appellant.

104 Cal. 107. 1894.

Appeal from a judgment of the Superior Court of Humboldt County.

The facts are stated in the opinion of the court.

McFarland, J.[1] — The plaintiff brought three actions against the defendant, each upon a promissory note made by the defendant to one John Lancaster, since deceased, who was a British subject and a resident of England, where he died testate on the 21st of April, 1884. The three actions were by the consent of parties and an order of the court consolidated. The court rendered judgment for plaintiff for the amount of the principal and interest of said three notes, with costs, etc. Defendant appeals from the judgment.

The judgment of the lower court went upon the theory, founded upon the findings, that the two sons of the deceased, George Granville Lancaster and John Lancaster Jr., were appointed by the will of the deceased as the executors thereof, and qualified as such; and were also appointed "administrators of the personal estate" of the deceased John Lancaster; that the will of the deceased was duly probated in an English court; that by said will the said sons were also made residuary legatees; and that on November 15, 1880, the said sons, George and John, as such executors and administrators, and being the owners of said notes, "sold, transferred, and set over" the same to the plaintiff herein.

The main evidence in the case introduced by plaintiff is found in a certain commission to take the testimony of said George and John Lancaster, issued to John C. New, consul general of the United States at London, by which it was undertaken to prove all the foregoing facts as to the death of John Lancaster, deceased, the existence of the will, its probate, issuance of letters testamentary and letters of administration to the sons, etc. Many objections were made by appellant to various parts of the evidence contained in said commission; but we will assume for the present that the evidence contained in this commission sufficiently shows the facts above referred to. There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here; and it must, therefore, be assumed that the law with respect to those matters was the same there as in California. *Norris* v. *Harris*, 15 Cal. 254; *Hickman* v. *Alpaugh*, 21 Cal. 226; *Hill* v. *Grigsby*, 32 Cal. 55; *Marsters* v. *Lash*, 61 Cal. 624; *Monroe* v. *Douglass*, 5 N. Y. 447; *Liverpool etc. Co.* v. *Phenix Ins. Co.*, 129 U. S. 445. This rule applies to England as well as to sister states of the American nation. In *Liverpool etc. Co.* v. *Phenix Ins. Co.*, 129 U. S. 445, the supreme court of the United States say: "The law of Great

[1] Part of the opinion is omitted.

Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved."

The alleged transfer or assignment of the said notes from the said George and John Lancaster was not by indorsement on the back of said notes, but consisted of a separate written instrument in which they recited that they had "bargained, sold, and transferred" the said notes to the plaintiff herein, and that they "do hereby sell, transfer, and set over" the same to the plaintiff; and it is said in said instrument that they sell, etc., said notes "as executors of John Lancaster, deceased, and as representing themselves and said estate"; and the document is signed "John Lancaster, George Granville Lancaster." Now, waiving all other points, and assuming the law of England to be the same as that of California, the said John and George Lancaster had no authority to sell and transfer said notes to the plaintiff. They were assets of the estate of John Lancaster, deceased, and could be sold only under and by an order of the probate court. Section 1517 of the Code of Civil Procedure provides that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter"; and the property involved here is not one of the exceptions. Section 1524 expressly provides that "choses in action may be sold in the same manner as other personal property." *Belloc* v. *Rogers*, 9 Cal. 128. The cases cited by respondent upon this point, such as *Weider* v. *Osborn*, 20 Or. 307, *Hough* v. *Bailey*, 22 Conn. 223, and *Marshall Co.* v. *Hanna*, 57 Iowa 375, were cases arising under statutes which only provided that tangible personal property could not be sold, except by an order of the probate court. For this reason the judgment must be reversed.

The foregoing point is conclusive of this appeal but, as the cause may be tried again, it is necessary to notice one or two other positions taken by appellant. . . .

The judgment is reversed and the cause remanded for a new trial.

DE HAVEN, J., and FITZGERALD, J., concurred.[1]

NUGENT *v.* GIFFORD AND OTHERS.

1 Atk. 463. 1738.

THE bill was brought against some of the defendants, as trustees of a mortgage term for an assignment, and against others to discover what interest they had in the premises.

[1] Statutes and decisions thereunder on the right of the personal representative to dispose of property without order of the court are collected in 2 Woerner, Am. Law of Adm. (2d. ed.), § 331.

It appeared that the mortgage in question, was a mortgage term to trustees in trust for Sir Richard Billings the testator, and Mr. Arundel executor of Sir Richard had assigned this mortgage term to the plaintiff, as a satisfaction for a debt due from Mr. Arundel to the plaintiff.

The question was, if such assignment was good against the daughters of Sir Richard Billings, who were creditors under the marriage settlement, and also to whom the trustees should assign the legal estate.

Lord Chancellor [Hardwicke]. The question is, if the two daughters, who are allowed to be creditors, are entitled to follow this mortgage term (in the hands of the plaintiff as assignee of it) as specific assets.

I am of opinion they are not, but that the plaintiff is entitled to the benefit of such assignment by the executor.

At law the executor has a power to dispose of, and alien the assets of the testator, and when they are aliened, no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets: this court will indeed follow assets upon voluntary alienations by collusion of the executor; but if the alienation is for *a valuable consideration*, unless fraud is proved, this court suffers it as well as at law, and will not control it; for a purchaser from an executor, has no power of knowing the debts of the testator; and if this court, upon the appearance of debts afterwards, would control such purchasers, nobody would venture to deal with executors.

It is objected first, that these were the equitable assets of Sir Richard Billings, and that the plaintiff purchased nothing but an equitable interest, burdened with all the equity in the hands of the person from whom he purchased.

But that is a rule only where there is a lien on the thing itself, and I know no difference in this court, between the power of an executor to dispose of equitable and legal assets.

The second objection is, that the assignee took this assignment with notice, that it was the testamentary assets of Sir Richard Billings.

But if this was sufficient to affect it, it would affect every purchase from an executor, because every such purchaser must have such notice.

The third objection is, that this is a *devastavit*, because the consideration was a debt of the executor's own.

But I know no rule in this court to warrant *that*, neither is there any difference between this and money paid down, provided it be done *bona fide*, a sum of money *bona fide*, due, is as good and valuable a consideration as any.

The only authorities relied on are *Crane* v. *Drake*, 2 Vern. 616, and *Paget* v. *Hoskins*, Prec. in Eq. 431. The first greatly differs from the

present case, there being express notice of a debt from the testator, still unsatisfied, and a contrivance between the purchaser and the executor, to defeat a just debt, and as Lord Chancellor said, the defendant was a party to, and contriving a *devastavit*.

Here was no notice of any debts due from the testator, for it is sworn in the answer, that Sir Richard Billings died worth £40,000, and this was a debt under a settlement, which is a private transaction in the family.

As to the case of *Paget* v. *Hoskins*, that was a gross sum computed by the wife as her share of her former husband's estate, according to the custom of London, and taken by the husband, subject to that account.

These are the only authorities, and both different from the present case; this I think therefore is a good alienation, and the plaintiff ought to have the benefit of it.[1]

HILL *v.* SIMPSON.

7 Ves. Jr. 152. 1802.

JOHN SMITH by his will, dated the 18th of January, 1785, among other legacies, gave to Jane Pearson the sum of £200 to be paid to her immediately, or as soon as possible on the death or marriage of his wife Elizabeth Smith; and he left Charles Rushworth £50, to be paid at the death of his said wife; and he appointed John Lush and his said wife Elizabeth Smith, executors. The testator died on the 23d of May, 1785; and his widow and Lush proved the will. Lush died on the 26th of January, 1796; and on his death, Elizabeth Smith possessed herself of all the personal estate of her late husband.

Elizabeth Smith by her will, made in 1790, directed all her debts, funeral expenses, and the expenses of the executors, to be paid; and, subject thereto and to her late husband's will, she gave, devised, and bequeathed, all and every the moneys, real and personal estates, securities for money, goods, chattels, and all other her estate and effects, to her nephews Joseph Simpson, William Thorley, and Henry Wright, and to the survivors and survivor of them, their and his executors and administrators; upon trust to convey the freehold property, consisting of two messuages, to her two nephews John Simpson and James Simpson; with remainder over to Joseph Simpson; and after giving some legacies she appointed Joseph Simpson, Thorley, and Wright, her executors.

Elizabeth Smith died on the 5th of April, 1797; leaving Joseph Simpson her heir at law; who alone proved her will; and possessed

[1] See *Mead* v. *Orrery*, 3 Atk. 235; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, 136; *M'Leod* v. *Drummond*, 17 Ves. Jr. 152, 164.

himself of her real and personal estates, and of part of the personal estate of John Smith. At her death there were standing in the name of John Smith in the books of the Bank of England £50 Five per cent Navy Annuities; £275 Four per cent Consolidated Annuities; £60 Short Annuities; and £550 Three per cent Reduced Annuities; which funds Simpson transferred to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. In 1798 a commission of bankruptcy issued against him.

Thomas Hill married Jane Pearson; and they and Rushworth, who was then an infant, filed the bill against Simpson and Wright, Thorley being dead, and against the assignees and the bankers; praying, that it may be declared, that the funds transferred by Simpson to the bankers are liable to the legacies of the plaintiffs, &c.

The defendants Moffatt & Co. by their answer stated, that about February, 1794, the defendant Simpson opened an account with them as bankers; which continued till his bankruptcy; in the course of which he drew a great number of bills on them; and was always or for the most part in their debt on the balance of such account; for which they repeatedly pressed him; and frequently refused to accept and pay his bills, until he remitted money to discharge or lessen such balance; and informed him, they would not continue such account; unless he made remittances to answer his bills. On the 11th of May, 1797, he was indebted to them £399 18*s.* 5*d.* besides other bills, which they had accepted for him, not then due; and he called upon them; and represented, that he was under the necessity of providing a very large sum of money immediately; and requested them to advance it; and to induce them to do so offered to transfer the funds mentioned in the bill as a security as well for the balance then due, as also what they should advance to him for his then occasions, and also all other sums, which they should at any time hereafter pay on his account; and these defendants having at the earnest solicitation of Simpson agreed to advance the money, which he had then immediate occasion for, he on the 11th of May, 1797, transferred to them £100 Three per cent Consolidated Annuities, and the several sums of stock mentioned in the bill. The £100 Three per cents were then standing in the names of Lush and Elizabeth Smith; and all the other funds in the name of John Smith; which the defendants knew, by reason that at the request of Simpson they received the dividends under a power of attorney granted by Elizabeth Smith; which they always placed to the credit of Simpson's account with them.

They denied, that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of Simpson as executor or devisee of Elizabeth Smith; or that they were part of the personal estate of John Smith; on the contrary they believed, they were Simpson's own property: and he represented to them, that he was absolutely entitled thereto, subject only to an annuity of £20

to Elizabeth Smith's sister during her life, and to a few very small legacies; that he had full right to dispose thereof; and would have disposed but for the low price of the funds; which he expected would rise. They also stated, that they did not know any of the legacies of John Smith to the plaintiffs or any other person were unpaid. The answer then set forth a letter from him to them, dated the 20th of April, 1797; stating the death of Elizabeth Smith; that she had left him the whole of her property, both real and personal, paying £20 a year to her sister for life, then seventy-six years old, and a few very small legacies; that he intended to be in London by the 28th; supposing her will must be proved in London, on account of the money in the funds; and stating his intention to produce the will to them, before he should do anything, as being well assured, they would advise him for the best to save expense.

The answer then stated, that in consequence of the said transfer, and upon the faith, credit, and validity thereof, the defendants on the 13th of May, 1797, paid bills and notes on account of Simpson to the amount of £673 1*s.* 6*d.* then outstanding; which they believe was the sum or part of it, which he was anxious to provide for. On the 16th of February, 1798, he gave the defendants the following authority in writing: —

London, 16th February, 1798.

Messrs. Moffatt, Kensington, and Styan.

Gentlemen: — Having some time back transferred into the name of your partner, Mr. John Pooley Kensington, sundry sums of different stocks and annuities as a security for any advances or engagements, which you might at that time have come under, or might at any future time come under, for me, I hereby authorize you to sell or otherwise dispose of the same, whenever you may think proper, at my risk, and for my account; and I will confirm and approve of the same; and will, whenever required by you, execute a legal instrument to that effect.

Joseph Simpson.

The answer farther stated, that upon the faith of the said transfer and security of the said funds the defendants did after such transfer and on the credit thereof pay the bills of Simpson to a much greater amount, and suffered him to be in arrear to defendants in a much larger balance than they had before done; insomuch, that on the 21st of June, 1798, when Simpson became bankrupt, he was indebted to defendants on the balance of accounts in £1,435 19*s.* 6*d.* They never had any other security; except, that Simpson and Elizabeth Smith executed a bond to them, dated the 22d of December, 1795, for securing any balance, which might be due from Simpson in account between him and them, and the bills, drafts, and notes, paid to them as his bankers; and which, when received, they placed to the credit of his account with them.

The answer was replied to; but the plaintiffs did not go into evidence.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is whether the plaintiffs, legatees, can follow the assets in the hands of third persons, to whom the executor has transferred them. There is [no] evidence in the cause but the answer. I cannot therefore infer anything against the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admission or denial of every fact, within the knowledge of the defendants. I cannot assume, that they ever saw Mrs. Smith's will; though Simpson says, he was to produce it to them; for they do not say, they ever did see it. Without doubt the plaintiffs are entitled to a decree against the executor, now a bankrupt; and his assignees are parties.

Several well known cases were referred to on both sides. The defendants rely upon *Nugent* v. *Gifford*, 1 Atk. 463; *Mead* v. *Lord Orrery*, 3 Atk. 235; and *Whale* v. *Booth*, 4 Term Rep. B. R. 625, *note*, as establishing the absolute right of the executor to bind the assets by any disposition; at least, where there is no actual fraud in the party taking under it. The other cases, *Humble* v. *Bill*, 2 Vern. 444; *Crane* v. *Drake*, 2 Vern. 616; *Farr* v. *Newman*, 4 Term Rep. B. R. 621; *Bonney* v. *Ridgard*, 2 Bro. C. C. 438; and *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, are relied on by the plaintiffs; as showing, that there are limits to that rule; which limits they contend are here transgressed. Though it is difficult to reconcile all the doctrine and *dicta*, that are to be found in the cases, the decisions do not appear to me to be inconsistent. It is true, that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them; for the power of disposition is generally incident; being frequently necessary; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee; when he knows, the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence.

In *Nugent* v. *Gifford* it appears from the Register's Book, as stated in *Andrew* v. *Wrigley*, though not in the report in Atkyns, that the testator died two years before the executor and residuary legatee made the assignment, that was impeached. At least therefore there was room to suppose, that the executor might in that period by advances on account of the trust have entitled himself to reimbursement out of the assets: but even so explained, the late Master of the Rolls would not go farther than to say, that case might be rightly

determined; and in *Scott* v. *Tyler*, Lord Thurlow said (2 Bro. C. C. 477), it was difficult to reconcile it with *Crane* v. *Drake*. In *Mead* v. *Lord Orrery*, Lord Hardwicke, instead of stating shortly and generally, that an executor has the absolute right to dispose, as he pleases, of the testator's property, enters into all the circumstances to show, that in that case the assignment ought to stand; that it was made several years after the testator's death; that it was not the case of a sole executor disposing for his own benefit, but of three executors, two not interested, one a residuary legatee; that, as he was one of the executors, and in his banking shop the money affairs were transacted, he might have been, as he was recited to be, the sole owner of the mortgage: he might be a creditor for that sum by advances made by him: or it might have been released and assigned to him by the other executors, as his share of the residuary estate. Under all those circumstances perhaps it would have been hard to have deprived the assignee of the benefit; and yet Lord Kenyon in *Bonney* v. *Ridgard*, with an accurate note of which I have been favored by Mr. Cox, declared his dissent from that case; and declared, he should have given the opposite decision; and yet there was nothing like express fraud; and no motive for it, in order to obtain that assignment; for Mead the younger was not indebted; but was only to give security for what might come to him afterwards as receiver; and he used the mortgage for that purpose. It was indifferent to them, whether they had that or any other security. But Lord Kenyon says, that, if there is either express or implied fraud, the purchaser is bound. In *Whale* v. *Booth*, though that case seems overruled by *Farr* v. *Newman*, stress was laid upon the circumstance, that the testator had been dead three years; and Lord Mansfield says, "If the executors paid all demands, as in that time they might have done, the assets belong to them."

Those three cases for the defendants are in some degree impeached in subsequent decisions. But, supposing they were not impeached, there is nothing in any of them excluding the possibility of the executor having acquired on the execution of the trust, a right to appropriate to himself the assets. But in this instance the assignment was made in less than a month after the death of Mrs. Smith. There is not therefore the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith by payments made in that short interval on account of either estate. It is not pretended, it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his, then actually outstanding. They had distinct notice therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any, that an executor in the first month after the

testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will; which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson; and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right. It may be essential, that the executor should have the power to sell the assets; but it is not essential, that he should have the power to pay his own creditor; and it is not just, that one man's property should be applied to the payment of another man's debt.

But the question is, not, whether the rule is now to be made more strict, but whether general justice and convenience require it to be relaxed beyond all former precedent. I should hesitate to go so far as other cases have gone: but this would go much farther than any. If the second point in *Scott* v. *Tyler* had received the decision which it was generally supposed would have been given, it would be an authority far beyond what these plaintiffs want;[1] for in that case the executrix had disposed of the River Lee Bonds four years after the death of the testator. The bankers swore, they knew nothing of the will; and they believed the bonds her own property, not that of the testator. If that case had been decided against the bankers, it would have furnished a stronger authority than is necessary for these plaintiffs.

Hitherto I have supposed the executor pretending on other authority than as executor; and that the other defendants relied solely upon his authority in that character. But the truth is, it was not upon his legal authority as executor that they relied: but they proceeded, as they state, upon the faith of his representation; by which they were induced to believe, that the property he assigned to them was actually his own; as the testatrix had left him everything, subject only to £20 a year, and a few small legacies. This representation is partly true, partly false. He was her residuary legatee; and it is taken for granted on all sides, that she had a right to dispose of this property: but he was subject to something more than £20 a year, and some trifling legacies, viz., the claims under her husband's will. This they would have seen, if they had looked at her will, instead of taking his representation. They would have

[1] It has since appeared, that, though that point ended in a compromise, Lord Thurlow had formed his judgment upon it against the bankers. See 2 Dick. 724. — REP.

See *M'Leod* v. *Drummond*, 17 Ves. Jr. 152, 166.

seen, that he had no right to assign the stock, till the claims under that will were satisfied; and that some of those claims were unsatisfied. Common prudence required, that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud: but they acted rashly, incautiously, and without the common attention used in the ordinary course of business; the reference in the will of Mrs. Smith to the will of her husband making it the same, as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding, that assets transferred [under] such circumstances may be followed.

For the defendants it is objected, that the plaintiffs were guilty of laches in not taking steps to secure their legacies in the life of Mrs. Smith. But one was an infant, when the bill was filed; and his legacy was not payable till her death; and though the plaintiff Hill might have filed a bill, it was not gross negligence not to do so for so small an object. There was no reason to think the fund was in danger; and upon inquiry she would have found stock sufficient left to answer her legacy. Upon the whole I am of opinion, these funds are liable to answer the plaintiffs' demands.[1]

TAYLOR *v.* HAWKINS.

8 Ves. Jr. 209. 1803.

RICHARD HAWKINS, being possessed of certain leasehold premises at Rotton Park, Birmingham, subject to a mortgage to Mary Dalton, by his will, dated the 6th of January, 1790, bequeathed the mortgaged premises and other leasehold estates to his son William Hawkins, to hold to him, his executors, &c., for the residue of the terms, subject to an annuity of £15 to his son Richard Hawkins for twenty years, if he should so long live; and in case his said son should die before the expiration of that term, then to the payment of the said sum of £15 for the remainder of the twenty years to his (the

[1] *Wilson* v. *Moore*, 1 Myl. & K. 337, *accord*.

Assets of the estate cannot be levied on by issue of an execution against the executor personally. *Farr* v. *Newman*, 4 T. R. 621. See *Branch Bank* v. *Wade*, 13 Ala. 427; *Whale* v. *Booth*, 4 T. R. 625 note; *Quick* v. *Staines*, 1 B & P. 293; *M'Leod* v. *Drummond*, 17 Ves. Jr. 152, 168, 169; *Gaskell* v. *Marshall*, 1 M. & Rob. 132.

testator's) wife for the use of his children, Sarah, Mary, and George Hawkins; and he appointed his wife and his son William executors.

Richard Hawkins, the testator, died in November, 1792. The executors proved the will. William Hawkins being engaged in trade in partnership with Thomas and John Hawkins became indebted to the plaintiffs as bankers to the amount of £2,000; and in June, 1793, they executed a bond in the penal sum of £3,000; and also by indenture of mortgage, dated the 24th of June, 1793, William Hawkins assigned the premises at Rotton Park to the plaintiffs, subject to the mortgage of Mary Dalton, and to the annuity of £15 under the will of Richard Hawkins, and to a proviso for redemption on payment of £1,500 and interest, and all other sums to be advanced by the plaintiffs.

In October, 1796, William Hawkins and his partners became bankrupts. In March, 1798, by consent of all parties the mortgaged premises were sold for £1,600. Upon that occasion James Reynolds informed the purchaser, that he was a creditor of Richard Hawkins the elder, by a bond, dated the 20th of July, 1784, in the principal sum of £300; and gave notice not to pay his purchase-money.

The bill filed by Taylor and his partners, Taylor being also administrator of Mary Dalton, prayed an account of the personal estate of the testator Richard Hawkins; that the purchaser may pay his purchase-money; and that the purchase-money may be applied in satisfaction of the mortgages; and that the defendant Reynolds may be decreed not to have any lien or claim upon the purchase-money in preference to the plaintiffs.

The defendant Reynolds by his answer insisted upon his bond for money lent; and stated frequent applications to the executors before the bankruptcy. He claimed a balance of £452 8*s.* 10*d.* as due upon the bond, after deducting a sum of £94 1*s.* received from the sale of leasehold premises mortgaged to him as an additional security. He insisted, that the surplus of the purchase-money after satisfying Mrs. Dalton's mortgage ought to be applied in satisfaction of what remains due on his bond in preference to the mortgage to the plaintiffs; especially as such mortgage was executed, not for the purpose of raising any money to discharge the debts of the testator, but only to secure the payment of debts personally incurred by William Hawkins and his partners with the plaintiffs in the course of their trade. He denied all fraud and collusion with Hawkins; and insisted, that he is a *bona fide* creditor; and ought to be paid out of the leasehold premises, as being the assets of Richard Hawkins, in preference to the plaintiff's demand.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] I do not recollect any case, in which the property was specifically bequeathed to the executor: but the person, to whom it has been specifically given, has generally been the party complaining. In this case there is not enough in this answer to ground an inquiry; if not, there is

nothing to stand upon. There must be some foundation for an inquiry; as if he had said, he believed, they knew, there were debts unpaid. The decree must therefore be according to the prayer of the bill.[1]

BRYAN, RESPONDENT *v.* STEWART, IMPLEADED, ETC., APPELLANT.

83 N. Y. 270. 1880.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made August 13, 1879, reversing a judgment in favor of plaintiff, entered upon the report of a referee, unless plaintiff stipulate to reduce, etc., as stated in opinion, wherein also the nature of the action and the material facts sufficiently appear.

MILLER, J. The General Term, upon the appeal to it, reversed the judgment and ordered a new trial, unless the plaintiff stipulated to deduct the item of $1,000 and interest, in which case it ordered that the judgment be affirmed. The plaintiff made the stipulation required, and the defendants appealed from the judgment as thus modified.

The action was in part for money lent and advanced by the plaintiff to the defendants at three different times. The items claimed were $1,000, $500, and $200. The evidence showed that the transaction took place with F. J. Barretto alone, one of the defendants, to whom the money was paid. The defendants were all executors of one estate, and there is no evidence that either of them, besides F. J. Barretto, had anything to do directly with the loans made. Nor does the proof show that the defendant F. J. Barretto assumed to borrow the money on account of the other defendants. The checks were to F. J. Barretto, and no direction in regard to the loans, or express provision to pay the same by the other defendants, is shown. The case arises upon contract, and the question to be determined is, whether the proof shows that the loans were made to the defendants jointly. F. J. Barretto had no authority to bind his associates, either as executors or individually; and unless there was an assent upon their part, they are not liable. We agree with the opinion of the General Term, that the evidence was insufficient to support the judgment as to the item of $1,000. In regard to the other items of money loaned, it must be admitted that the testimony is not very satisfactory. The testimony of the plaintiff as to the item of $500 shows that after the loan of $1,000, F. J. Barretto called again and said the bills came to more money than he thought they would, and he was short of money. The plaintiff remarked to him that he supposed that Barretto was to make the advances, find this

[1] See *Spackman* v. *Timbrell*, 8 Sim. 253, 260.

money and pay all the bills, as he had said, and that he, the plaintiff, was making them. Barretto replied: "We will have lots of money after the sale"; and the plaintiff then gave him the $500. There was no statement that the money was borrowed on account of the other defendants, or any one but by Barretto himself. He referred to the expenses as being paid by himself alone, and did not request the plaintiff to pay them, or in any way promise that the other defendants would become liable therefor; did not say that they wanted to borrow the money, or in any way intimate that the loan was to them, or otherwise than to himself individually, to whom the $1,000 loan was previously made. The evidence which is relied upon to show that F. J. Barretto was authorized to borrow money for the other defendants is certainly not very strong. Mr. Stewart's testimony, that he never made any contracts as to the expenses of the sale or in relation thereto, and that he did not know of any being made except by F. J. Barretto, and his remark to the plaintiff that his bill was as good as gold, as well as the statement of Henry C. Barretto that he was not an acting executor, and that he assented to whatever F. J. Barretto did, but he had no money himself to spend for the disbursements of the sale, do not go very far toward showing a promise to pay, or a request to advance the money, or an assumption of personal liability by the other defendants. Nor do the other circumstances which are relied upon by the respondent tend very strongly in that direction. As to the $200, it was also shown that it was loaned on the check of F. J. Barretto; and plaintiff swears that F. J. Barretto said he wanted it to pay for a special train, to take passengers to the place of sale. The evidence is certainly very slight to establish authority in F. J. Barretto to bind the other defendants, or a ratification of his acts in borrowing the money. Conceding that the advances made by him were for the benefit of the estate, it was no more than in the line of his duty, and he was credited for what he paid personally upon the settlement. It is at least very questionable whether enough appears to authorize a recovery for the items referred to. But without determining that question, we are of opinion that the findings of the referee, in the record before us, are insufficient to uphold the judgment.

The referee found that on the part of the defendants, the business relating to the sale of the lots belonging to the estate, of which the defendants were executors, was with their assent conducted by the defendant Francis J. Barretto who disbursed several thousand dollars on account of the expenses of such sale; that the plaintiff advanced to said Barretto, for the purpose of defraying expenses which had been or were about to be incurred, the various sums mentioned in the complaint; and as a matter of law, that the several advances and expenditures made by the plaintiff were made and advanced for the benefit and at the request of all the defendants, and that they were responsible for the repayment thereof. We think that

the conclusion of law of the referee was not warranted by the findings of fact. Conceding that Francis J. Barretto conducted the business, and that the plaintiff advanced money to meet the expenses thereof, it by no means follows, as a necessary consequence and logical result, that the defendants reaped any benefit thereby or requested the plaintiff to make the advances. The defendants were executors, and one of them had no authority alone to borrow money without the assent of the others, and such assent is not to be assumed because, as found by the referee, it was for the benefit of the estate. The fact alone does not establish a liability against all of the defendants; nor can they be made jointly liable because they were jointly interested. As no request was found as a matter of fact, the conclusion of law was clearly erroneous; and the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.[1]

ANONYMOUS.

Dyer, 23 b, pl. 146. 1536.

KNIGHTLEY asked this question: If two executors have a term, and one grants to a stranger all that belongs to him, how much of the term shall pass? And the Court thought, that all the whole term passed, inasmuch as each of them has an entire authority and interest in the term, as executor; but of other joint-tenants of a term it is otherwise: so there is a diversity.[2]

SHAW *v.* BERRY ET AL., ADMINISTRATORS.

35 Me. 279. 1853.

ON EXCEPTIONS from *Nisi Prius*, WELLS, J., presiding.

The suit was originally against Jacob M. Berry. After his decease, the defendants, being cited in as his administrators, appeared and took upon themselves the defence of the suit.

At the trial, they offered the testimony of one Sands, who, being objected to for interest, was excluded. He thereupon produced a release, executed by James Berry, one of the administrators. His competency, however, was still objected to by the plaintiff,

[1] *Scruggs* v. *Driver*, 31 Ala. 274; *Turner* v. *Hardey*, 9 M. & W. 770. *accord.* Compare *Wilson* v. *Mason*, 158 Ill. 304, 312. As to an admission of one of several executors, see *Weston* v. *Murnan*, 4 Ind. 271; *M'Intire* v. *Morris*, 14 Wend. 90. A new promise by one of several executors will revive a debt barred by the Statute of Limitations. *Shreve* v. *Joyce*, 36 N. J. L. 44; *MacDonald* v. *Fraser*, [1897] 2 Ch. 181.

[2] Compare *Lepard* v. *Vernon*, 2 V. & B. 51; *Townson* v. *Tickell*, 3 B. & Ald. 31, 40; *Cole* v. *Miles*, 10 Hare 179.

but he was admitted and testified. The verdict was for the defendants.

To the admission of the witness, the plaintiff excepted.

RICE, J. The only question reserved for the consideration of the Court is whether James Berry, one of the administrators on the estate of Jacob M. Berry, had, by virtue of his office, authority to release any interest which the witness Sands had in the result of the suit.

It appears to be well settled, that if a man appoint several executors they are esteemed in law but one person, representing the testator, and the acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the act of all. If one releases a debt it is good and binds all the rest. *Wheeler & Al. Ex'rs* v. *Wheeler*, 9 Cowan, 34.

In the case of joint executors or administrators, the authority of each is entire, and competent to the discharge of debts due the estate. 1 Atk. 28.

After administration is granted, the power of an administrator is equal to, and with the power of an executor. Williams on Executors, 609; Toller on Executors, 243; *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

Power to release an absolute debt would necessarily include authority to release a contingent liability.

Exceptions overruled.[1]

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

SMITH *v.* WHITING.

9 Mass. 334. 1812.

CASE "for that the said Aaron at etc. on, etc. by his note under his hand of that date, for value received in a debt due to the estate of Ephraim Pollard deceased, promised John Hartwell and Mary Pollard, executors of the last will of said Ephraim Pollard, to pay them 566 dollars 22 cents in one year from date with interest; and the said John, who acted as executor as aforesaid, afterwards on, etc. at, etc. by his endorsement on said note, under his hand, for value received, ordered the contents thereof, then due and unpaid, to be paid to the plaintiff; of all which the said Aaron then and there had due notice, and thereupon became liable to pay the same to the plaintiff. Yet though requested," etc.

The defendant demurred generally to the declaration, and the plaintiff joined in demurrer.

[1] *Beecher* v. *Buckingham*, 18 Conn. 110; *Herald* v. *Harper*, 8 Blackf. 170; *Bryan* v. *Thompson*, 7 J. J. Marsh 586; *Rick* v. *Gibson*, 1 Pa. 54; 1 Williams, Exec. (10th. ed.), p. 720, *accord*. But see *Jordan* v. *Spiers*, 113 N. C. 344.

The action stood continued *nisi*, and the next week in *Middlesex*.

THE COURT observed that, having looked into the cases cited in the argument, they were satisfied that the defendant must prevail. The question is, whether one of two executors is competent to transfer by endorsement a negotiable promissory note made to the two in their character of executors. The promisees, not being copartners, had each but a moiety. One therefore could not assign the whole. Nor was it competent for him to assign his moiety.

Declaration adjudged bad.[1]

NANZ, APPELLANT *v.* OAKLEY, RESPONDENT.

120 N. Y. 84. 1890.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 17, 1885, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

HAIGHT, J. One Eliza Munday, as the present owner of the claim in suit, joins with the plaintiff in this appeal. The action was brought against the defendant, as surety, upon an administrator's bond to recover the amount adjudged by the surrogate to be due and owing by the administrator, and which he was ordered to pay to Cornelius W. Depew, as administrator of Rachel Depew, deceased.

It appears that one Mary Ann Schultz died in the city of New York intestate, and that Rachel Depew was her only heir at law and next of kin. That on her petition Bornt P. Winant and herself were appointed administrator and administratrix of the estate, and the defendant and one Peter Cortelyou executed the usual bond, which was joint and several, as sureties. It further appears that Winant alone administered the estate, and that on a final accounting before the surrogate it was adjudged and decreed that there was in his hands, as such administrator, the sum of $1,930, which with the interest, costs and disbursements of the proceedings to compel him to account, amounted in the aggregate to $4,017.57, which sum he was ordered to pay over to Cornelius W. Depew, as administrator of Rachel Depew, she having died in the meantime. Winant having converted the money to his own use, failed to make payment and the decree was duly docketed, execution issued and returned unsatisfied,

[1] *Clark* v. *Gramling*, 54 Ark. 525; *Sanders* v. *Blain*, 6 J. J. Marsh 446, *accord*. *Bogert* v. *Hertell*, 4 Hill (N. Y.) 492; *MacKay* v. *St. Mary's Church*, 15 R. I. 121; *Fesmire* v. *Shannon*, 143 Pa. 201, *contra*. See *De Haven* v. *Williams*, 80 Pa. 480; *Packer* v. *Owens*, 164 Pa. 185, 192.

and thereupon this action was brought against the defendant, the sole surviving surety upon the administrator's bond, Depew as such administrator having assigned the claim to the plaintiff.

The trial court held that the plaintiff was not entitled to recover, for the reason that Rachel Depew was a co-administratrix with Winant; that she was one of the principals in the bond of which the defendant was surety, and that she could not maintain an action against her own surety for the wrongful acts of her co-principal. This would be so if by executing the bond she became liable as surety for the devastavit of Winant, her co-principal. This question has received attention in numerous reported cases in the different states, in some of which it has been held that one executing a bond is liable for the default of his co-principal. *Brazier* v. *Clark*, 5 Pick. 96; *Towne* v. *Ammidown*, 20 id. 535; *Newton* v. *Newton*, 53 N. H. 537; *Ames* v. *Armstrong*, 106 Mass. 15; *Boyd* v. *Boyd*, 1 Watts, 365; *Bostwick* v. *Elliott*, 3 Head, 507; *Babcock* v. *Hubbard*, 2 Conn. 536; *Caskie* v. *Harrison*, 76 Va. 85; *Jeffries* v. *Lawson*, 39 Miss. 791; *Braxton* v. *State*, 25 Ind. 82; *Moore* v. *State*, 49 id. 558; *Eckert* v. *Myers*, 15 N. E. Rep. 862.

[The learned judge then discussed these cases, and continued as follows: — Ed.]

In our own state but one case has been found in which the question appears to have been considered, and that was the case of *Kirby* v. *Taylor*, first reported in 6 Johnson's Chancery, 242–253, wherein Chancellor Kent remarks that "it was probably not the intention of the bond that Thompson should himself be considered as a surety for his co-guardian." The same case was again reported in Hopkin's Chancery, 309–331, in which Chancellor Sanford considers the question in an elaborate opinion, reaching the conclusion that a principal in a guardian's bond is not liable to the sureties for the default of his co-principal.

This question was not considered in the case of *Tighe* v. *Morrison* 116 N. Y. 263; and in the case of *Sperb* v. *McCoun* 110 id. 605, the question was as to whether one administrator could maintain an action upon the bond against the sureties to recover the amount of the devastavit of a co-administrator, and it was held that such action could be maintained even upon its assumption that the plaintiff individually was liable to the sureties upon the bond, but it was expressly stated by the court in its opinion that it did not deem it important to determine the relation which the plaintiff individually, as one of the principals in the bond, bears to the sureties in reference to the default.

The question in reference to the liability of executors and administrators for the default of each other, independent of any bond, is well settled by the authorities. Each of several executors or administrators has the power to reduce to possession the assets and collect all the debts due the estate, and is responsible for all that he

receives. The payment of money or delivery of assets to a co-executor or co-administrator will not discharge him from liability; for having received the assets of his official capacity, he can discharge himself only by a due administration thereof in accordance with the requirements of the law. Consequently one joint executor or administrator is not liable for the assets which come into the hands of the other, nor for the laches, waste, devastavit or mismanagement of his co-executor or co-administrator, unless he consents to or joins in an act resulting in loss to the estate, in which event he will become liable. In other words, co-executors and co-administrators may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. *Bruen* v. *Gillet*, 115 N. Y. 10; *Croft* v. *Williams*, 88 id. 384; *Ormiston* v. *Olcott*, 84 id. 339; *Adair* v. *Brimmer*, 74 id. 539; 2 Woerner's Law of Admin. Sec. 348; Brandt on Suretyship, etc., Sec. 490.

It is not claimed that any of the estate came into the hands of Rachel Depew, as administratrix, or that she as such committed any act or default that would make her liable for the devastavit of Winant, unless she may be liable therefor upon the bond executed by her. The bond thus executed was in the form required by the statute, conditioned that they should faithfully execute the trust reposed in them as such administratrix and administrator, and that they shall obey all orders of the surrogate touching the administration of the estate committed to them. The statute provides that every person appointed administrator *shall*, before receiving letters, execute a bond to the people of the state, with two or more competent sureties, to be approved by the surrogate and to be *jointly and severally bound*. 3 R. S. [6th ed.] 82, Sec. 56.

So that, before receiving letters, she was required to execute the statutory bond, and having been associated with Winant as co-administratrix, she joined with him in executing the bond in which they each undertook to faithfully execute the trust reposed in them as administratrix and administrator. What was the trust reposed in her as administratrix? It was to administer upon the money and assets coming into her hands, and for which she became personally liable, and for such assets as came into their joint possession in which they became jointly liable to administer and account, and not to execute the trust as to money and assets which came into the exclusive control and management of her co-principal, over which she had no jurisdiction or control. They were to obey all orders of the surrogate touching the administration of the estate committed to them. What orders was she to obey? Those that were addressed to her, not those that were addressed to her co-administrator. The object of an administrator's bond is to enforce or insure the discharge of the duty reposed in the persons appointed. It was not intended in requiring such a bond to be executed, to change the liability or

duties of the persons appointed from that which existed under the provisions of the statute independent of the bond. The bond was not intended to vary their obligation or their rights and duties as are defined by law. Their duties were the same after the bond had been given as they would have been had no bond been required or executed. They were consequently jointly liable for joint acts, and severally liable for their own acts. Rachel Depew and Winant each signed the bond as principal. Neither signed it as surety. The defendant signed as surety, and as such she became liable for the joint acts of the principals and for the individual defaults of each.

It is true they joined in executing a single bond jointly with sureties. They doubtless had the right to execute and file separate bonds; but this was unnecessary, for their act in executing the one instrument should be construed as if they had executed separate bonds. Joint administrators may be willing to undertake the trust reposed in them when each knows that he is responsible only for his own acts and those in which he joins with his associate, when he would not be willing to become surety for the separate acts of his colleague. The claim that joint liability for the acts of each other under the bond will promote diligence on the part of the principals, does not appear to us to be well founded. It may be true that sureties are at times without power by timely intervention to prevent waste by one of several administrators, but such want of power may be equally true in reference to the other joint administrators. As we have seen, one may collect a debt or take into his possession an asset, and having reduced it to possession, he must be responsible for the proper administration of it. His associate cannot demand or recover it from him, and should he see fit to abscond or commit waste without the knowledge of his associate, such associate would have no other, further or greater power to prevent it than the surety.

Other questions were raised upon the argument in reference to the transfer of this claim to the plaintiff, but none which we deem it necessary here to discuss.

As to the appeal of Eliza Mundy, we have not thought it necessary to consider at this time. It has done no harm. No motion was made to dismiss in this court. Such motions have been made in the court below, one of which is said to be still pending.

For the reasons already stated, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLLETT, Ch. J., and VANN, J., dissenting.

Judgment reversed.[1]

[1] Compare *Edmonds* v. *Crenshaw*, 14 Pet. 166; *Townsend* v. *Barber*, 1 Dick. 356; 1 Perry, Trusts (6th ed.), §§ 421–425; 2 Woerner, Am. Law of Adm. (2d. ed.), § 348.

CHAPTER X.

PAYMENT OF DEBTS, LEGACIES, AND DISTRIBUTIVE SHARES.

SECTION I.

SURVIVAL OF CLAIMS.

TUCKE'S CASE.

3 Leon. 241. 1590.

IN this case, it was holden by all the Barons clearly, that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, no not in the case of the king, because it is a personal wrong only.[1]

HAMBLY ET AL., ASSIGNEES OF MOON *v.* TROTT, ADMINISTRATOR.

Cowp. 371. 1776.

LORD MANSFIELD.[2] This was an action of trover against an administrator, with the will annexed. The *trover* and *conversion* were both charged to have been committed by the testator in his lifetime: the plea pleaded was, that the *testator* was *Not guilty.* A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a *tort,* for which an executor or administrator is not liable to answer.

The maxim, *Actio personalis moritur cum persona,* upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in *form* a *fiction,* and in *substance* founded on *property,* for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

[1] But equity gave relief. *Price* v. *Morgan,* 2 Ch. Cas. 215. And finally Parliament allowed a remedy at law. Stats. 30 Car. II., c. 7 (1678); 4 & 5 W. & M., c. 24, § 12 (1693).

[2] Only the opinion is given.

We therefore thought the matter well deserved consideration. We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the *cause* of *action*. *Secondly*, as to actions which survive against an executor, or die with the person, on account of the *form* of *action*.

As to the *first;* where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* (as is said in Sir T. Raym. 57, *Hole* v. *Blandford*), supposed to be *by force* and *against the king's peace*, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the *form of action*. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. — No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the *testator* was *not guilty*, can lie against the *executor*. Upon the face of the record, the cause of action arises *ex delicto;* and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. — An action on the custom of the realm against a common carrier, is for a *tort* and supposed crime: The plea is *Not guilty;* therefore, it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie. — So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71 (*Bailey* v. *Birtles et uxor, executrix of Richard Baily*), which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, "that he was possessed of a *cow*, which he *delivered* to the testator, Richard Bailey, in his lifetime, to *keep* the same for the use of him the *plaintiff;* which cow the said Richard afterwards *sold*, and did *convert* and dispose of *the money to his own use;* and that neither the

said Richard, in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the *executor* was liable for the *value*. But the special injury charged, obliged him to plead, that the *testator* was *not guilty*. The jury found him guilty. It was moved in arrest of judgment, because this is a *tort* for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a *mis-feasance*, yet for a *non-feasance* he is: as for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539; 9 Co. 50 b; where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem:* But not withstanding this the court held "it was a *tort*, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Saville, 40, a difference taken." That was the case of *Sir Henry Sherrington*, who had cut down trees upon the queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.[1]

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act

[1] And so *Powell* v. *Rees*, 7 A. & E. 426.

"If goods shall have been taken by J. S. tortiously and if J. S. died, though the executor cannot have trespass at common law, yet he should have replevin if the goods have not been consumed, 34 E. 2, Tit. Avowry, 257, & 17 E. 2, Tit. Executor 106, and a writ of detinue, for the thing ought to be recovered, and the property continues in the Executor; and likewise if J. S. took goods tortiously and died and if the goods continue in existence, trespass does not lie against the Executors of J. S.; but, if the Executors have the goods in their possession then detinue lies against them on their own possession. 21 H. 6, 2." *LeMason* v. *Dixon*, W. Jones, 173, 174. And so *Denny* v. *Booker*, 2 Bibb 427; *Clapp* v. *Walters*, 2 Tex. 130; *Allen* v. *Harlan*, 6 Leigh 42; *Catlett* v. *Russell*, 6 Leigh 344. Compare *Walter* v. *Miller*, 1 Har. (Del.) 7; *Batty* v. *Greene*, 206 Mass. 561, *post*, p. 637; *Newsum* v. *Newsum*, 1 Leigh 86; *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406.

of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173–4; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz., that the *testator* was *not guilty;* and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto,* or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an *action for money had and received.* Therefore, we are all of opinion that the judgment must be arrested.

PER CURIAM. *Judgment arrested.*

BATTY *v.* GREENE, ADMINISTRATOR.

206 Mass. 561. 1910.

HAMMOND, J.[1] This is a bill in equity brought against the administrator of the estate of Elizabeth H. F. Mitchinson, so called, to recover property obtained by the said Mitchinson by fraud and still held by the defendant as a part of her estate. The case was sent to a master, and is before us upon appeals taken by the defendant to the decree affirming the master's report and to the final decree in favor of the plaintiff. Since this action was brought the original plaintiff has died and the action is now prosecuted by Edwin Batty, the administrator of his estate.

The following facts, among others, are found by the master: Charles Batty, the original plaintiff, went through a marriage ceremony with the said Mitchinson in September, 1889, and they lived together as husband and wife from that time until her death, which occurred October 13, 1902. Before this she had gone through a marriage ceremony with one Mitchinson, with whom she had lived for nineteen years as his wife until his death, which occurred before the marriage ceremony between herself and Batty. After her death it transpired that before either of these ceremonies she had married in England one Fotherby, who died in April, 1902. Of this marriage Batty knew nothing "until after June 27, 1898, and before April, 1902." Batty at the time of his supposed marriage owned some property, and for several years carried on a "butter and egg business" in Worcester, while the wife kept a boarding house in Webster, both in this State. After a while he gave up the business in Worcester and spent all his time in Webster, "rendering some, but not much, aid to his wife in running the boarding house." About seven years after the marriage the boarding house business was given up, and they came to Worces-

[1] The statement of facts is omitted.

ter to live in the lower tenement of one of the houses purchased after the marriage and standing in her name. "From the time of his marriage Batty put his money into a common fund with his wife's, which was used for the purposes of both, and for convenience in drawing checks; sometimes a part of it was kept in a bank in Batty's name. Batty put the profits of his business, the rents from his houses, and all sums of money received by him into the common fund." All the houses purchased since the marriage with money from this common fund stood in the name of the wife. Of the common fund existing at the time of her death Batty contributed at least six-fifteenths. The master found that he was entitled to this as being his just proportion thereof; and the final decree is in favor of the plaintiff for that part, being the sum of $4,856.80, with interest from October 13, 1902.

There can be no doubt that the intentional concealment by the supposed wife that she had been previously married to Fotherby and that her marriage was still in full force, was a fraud upon Batty, for which, during the lifetime of the parties, he could have maintained an action of deceit or a petition to annul the marriage. It was a fraud as to the very *essentialia* of the marriage contract. *Kidney* v. *Stoddard*, 7 Met. 252. *Stewart* v. *Wyoming Cattle Ranche Co.* 128 U. S. 383. Cooley on Torts (3d ed.), 910, and cases cited. *Reynolds* v. *Reynolds*, 3 Allen, 605. *Morrill* v. *Palmer*, 68 Vt. 1. See also *Van Houten* v. *Morse*, 162 Mass. 414, and cases cited.

It is urged by the defendant that the right of action did not survive the death of the person who committed the fraud. It is to be noted that this is not an action at common law to recover damages for fraud, nor in the nature of such an action. It is a suit to recover specific property (or the avails thereof) procured by fraud and still held as a part of the estate of the fraudulent party. It rests upon a general rule, a good statement of which may be found in Perry on Trusts, in the following language: "If one party procures the legal title to property from another by fraud or misrepresentation or concealment, . . . equity will convert such party thus obtaining the property into a trustee . . . and this trust . . . [courts of equity] . . . will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society." Perry on Trusts (5th ed.), § 166. See also Pom. Eq. Jur. (3d ed.) §§ 1044, 1047, and cases there cited. If this case comes within this general rule, then the cause of action survives. *Parker* v. *Simpson*, 180 Mass. 334, 343, and cases cited.

It is contended however by the defendant that the present case is not within the rule; and in support of this contention he argues that the fraud complained of affected primarily the person defrauded and not his property, that no property was obtained at the time of the

fraud nor as a direct result thereof, but that the injuries to his property or property rights were merely incidental (see *Jenkins* v. *French*, 58 N. H. 532, 533), and that while this loss might properly be considered as an element of damages in an action of deceit, yet of itself, it furnishes no new or independent cause of action. (See *Payne's Appeal*, 65 Conn. 397.) But we think this objection untenable. While it is true that at the time of the fraud no property passed to the offending party, still the fraud consisted not alone of one single act, but of a continuous series of acts, or rather of a continuous situation. Day by day and hour by hour did this woman, by maintaining in appearance the relation of a lawful wife, renew and repeat this fraud. The concealment was continuous, and the fraud was as continuous as the concealment. It existed at the time of the marriage, and at the respective times when Batty contributed to the common fund. And this suit is not based upon the concealment when the marriage ceremony took place, but upon that existing when Batty parted with his property. In every proper sense the property although not obtained at the time the concealment began, was obtained by the concealment existing at the time it was passed to the offending party and as the direct consequence of the resulting fraud. See *Morrill* v. *Palmer*, 68 Vt. 1.

The master has not found how long before April, 1902, Batty knew of the fraud, and he has not reported the circumstances for the delay of the plaintiff after he knew of it; and we are of opinion that Batty has not been shown to be guilty of laches.

It follows that the plaintiff is entitled to a decree in his favor. The suit being to recover property (or the avails thereof) fraudulently obtained, the provision of the decree that interest should be allowed from October 13, 1902, the time of the death of the supposed wife, was favorable enough to the defendant. *Parker* v. *Simpson*, 180 Mass. 334, 358, and cases cited.

Nor should the defendant be allowed in this suit the costs and expenses sustained in the former proceeding of *Hargraves* v. *Batty*, mentioned in the defendant's brief.

Decrees affirmed.

QUIRK *v.* EXECUTOR OF THOMAS.

[1916] 1 K. B. 516. 1915.

PHILLIMORE, L. J. read the following judgment:[1] — This is an action by the plaintiff, a single woman, for breach of promise of marriage, begun against the man and revived against his executor. In the statement of claim delivered after the revivor the plaintiff alleged an early promise on March 17, 1897, broken off and renewed

[1] The statement of facts, part of the opinion on the question of costs, and the opinions of SWINFEN EADY, L. J., and PICKFORD, L. J., are omitted.

in or about May, 1910, and, as her counsel construes her pleading, laid the promise of May, 1910, as a promise by the man that, if she would give up her business as a milliner and marry him, he would marry her. I have some doubt whether this is the true construction of the pleading, but let it pass. By amendment, which she was allowed to make during the trial, she added an allegation of an intermediate promise in June or July, 1909, and stated that the man repeated this promise in May, 1910, and then promised on the terms already stated. The date May, 1910, was afterwards altered to June 6, 1910. She made no claim for ordinary or general damages, but claimed as special damage the loss occasioned to her by giving up her business as a milliner.

At the close of the plaintiff's case it was submitted on behalf of the defendant that there was no case to answer. The judge reserved the point. It was also submitted that there was no material corroboration of the plaintiff's evidence. As to this, the judge with some doubt held that there was just enough. No evidence was called for the defendant. The judge thereupon left the following questions to the jury: (1.) Did the deceased promise to marry the plaintiff (*a*) in June or July, 1909; (*b*) on June 6, 1910? (2.) Has she suffered any and what special damage through the breach (telling them that for their purposes they might treat the loss of the milliner's business as special damage)? The jury answered Yes to all the questions and assessed the damages at 350*l*.

Upon further consideration LUSH J. held that there was sufficient evidence of a bargain that the plaintiff should give up her business in consideration of a promise to marry, and of her having suffered by giving up her business. This left three points for his decision: first, whether an action for breach of promise whereby special damage has arisen can be maintained against the executor of the person who has broken his or her contract; secondly, whether the loss sustained by the plaintiff through giving up her business could properly be treated as special damage; and thirdly, whether it was damage arising from the breach. The last two questions rather run into one. The judge decided them all in favour of the defendant, and from his decision the plaintiff appeals. The defendant's advisers notified those of the plaintiff that on the appeal they should contend that there was no material corroboration of the promise, and his counsel have raised this point before us.

This point must be taken first. There was corroboration of the alleged promise in 1909.[1] But this is by itself of no value. That engagement was one of simple mutual promises to marry. The giving up of the milliner's business formed no part of that bargain. It is difficult to see how there could be any consideration for a further promise in 1910, which is the only one which will avail the plaintiff, if the promise of 1909 was still a subsisting engage-

[1] See Stat. 32 & 33 Vict., c. 68, § 2 (1869).

ment; and it is not alleged that it had been rescinded. What alone will be of use to the plaintiff is corroboration of the promise in 1910. As to this it is said that evidence of antecedent conduct may be confirmation. So I think it may sometimes, as was held, and apparently for good reasons, in *Wilcox* v. *Gotfrey*, 26 L. T. 481. But what is the antecedent confirmation here? It is said that they had been engaged once and had broken it off; that they had been engaged a second time and either broke it off again, which does not give corroboration to her evidence as to a third promise, or did not break it off again, in which case the supposed third promise is nugatory. It is further said that the letters she wrote to him, and to which no answers have been except in three cases preserved, demanded an answer, and that his silence is an admission. The case of *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, shows how this point is to be treated. There may be circumstances in which there is a duty to answer letters, or in which the probability is so strong that a letter would be answered, that an inference may be drawn from silence. But the general rule is otherwise.

Now the question of corroboration is for the Court. There are a number of letters, of the earlier of which she produces her drafts, and the later of which are produced by the defendant. Assuming that there are some which the jury, if the letters got to them, might construe as averring, not merely a promise of marriage, but the only promise of marriage which will help her, these letters came after other letters of a different character; and if a woman, who has been a man's mistress, first writes asking for money on general grounds, and afterwards changes her tune and avers a breach of promise, it cannot be that any inference is to be drawn from the fact that the man did not answer her later letters. Besides this, as to the letters which are drafts we have only her word; there is no corroboration; and as to his not having answered, we have her own evidence that she destroyed many of his letters. She says that these destroyed letters contain admissions. But they may just as well have contained denials. We have only her word. With deference to the learned judge (who indeed hesitated upon this point) I think there was no material corroboration of the promise of 1910, and that on this ground the action fails.

But there remain the other two points; and on one of them I wish to base my judgment in favour of the defendant quite as much as upon the first point.

Can an action for breach of promise of marriage lie against an executor? It would savour of undue curiosity to make this judgment a vehicle for a disquisition upon the origin and modifications of the maxim *actio personalis moritur cum persona*. The position under the common law as aided by the statute 4 Edw. 3, c. 7, is now pretty well settled. If the *persona mortua* be the claimant, his executor cannot obtain any benefit for his estate by acquiring damages which

would have been given only as compensation to the living man for injury to his body or to his character. And this rule applies equally whether the claim arises in respect of some tortious injury or in respect of a breach of contract, such as that of a railway company to carry carefully or of a surgeon to perform an operation skilfully. But if the tort or the breach of contract occasion damage to the dead man's property the executor can recover damages, limited to compensation for this special loss. The cases of *Knights* v. *Quarles*, 4 Moore, C. P. 532; 2 Brod. St. B. 102, *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 10 C. P. 189, (as far as it is an authority), *Leggott* v. *Great Northern Ry. Co.*, 1 Q. B. D. 599, and *Hatchard* v. *Mége*, 18 Q. B. D. 771, are illustrations of this.

Now let the claim have arisen against the *persona mortua*. If it be a claim in tort, however slight the tortious quasi-criminal element may be, that is to say, if it be a claim to which the defence of the general issue would under the old pleading have taken the form of "not guilty," no action lies against the executor. This may be considered settled since the decision in *Hambly* v. *Trott*, 1 Cowp. 371. There are two exceptions. One is by virtue of the special provisions for certain cases made by the statute 3 & 4 Will. 4, c. 42. The other is the action upon the custom of England against the executors of a deceased incumbent for dilapidations, so far as this form of action remains since the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43). If, however, the action be for breach of contract, the cause of action apparently survives against the executor, whatever may have been the nature of the injury caused by the breach of contract, whether it be an injury to the living man's person or his property; and this seems sound in principle.

Now to deal with the one special action of breach of promise of marriage. It is an action for breach of contract, and would therefore seem to survive against the executor of the contract-breaker, but it is an action of a special character where the measure of damages may be that which is otherwise only applicable in some actions of tort. Exemplary or punitive damages can be given. The misconduct of the defendant can be used for enhancing the damages, though it has no direct bearing upon any question of compensation of the plaintiff. It has therefore been questioned whether in the matter of survivorship this action ranks with actions of tort, or whether it ranks with ordinary actions for breach of contract.

There have been two cases where one or other of the parties was dead reported in England, and four in America. In none has the action succeeded. But there have been expressions of opinion in both the English cases, and in some, I think, of the American, that such an action might survive if special damage issuing from the breach were pleaded and proved. In *Chamberlain* v. *Williamson*, 2 M. & S. 408, the injured party was dead, and the claim was made by her personal representative. The rule was there stated to be that all

actions strictly personal (that is, as I understand, for compensation for injury to character or person) die with the *persona;* that executors and administrators are the representatives of the property, that is, the debts and goods, of the deceased, but not of his wrongs, except where those wrongs operate to the temporal injury of his personal estate. "But in that case the special damage ought to be stated on the record; otherwise the Court cannot intend it." The Court proceeded to state that "loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the Court cannot intend it." In that case there were no special circumstances. It was an ordinary action of breach of promise and failed. In the other English case, *Finlay* v. *Chirney*, 20 Q. B. D. 494, it was the promise-breaker who was dead. The matter came before the Court of Appeal in a somewhat peculiar manner. At the trial the plaintiff was nonsuited upon the ground that there was no corroboration of the promise. The Divisional Court thought that this was wrong and proposed to send the case down for a new trial. The objection was taken before the Divisional Court that the executors of a deceased promisor would not be liable, but the Court thought the matter should still go down for a new trial. The executors appealed to the Court of Appeal. The original pleadings contained no suggestion of special damage, but the Divisional Court gave leave to the plaintiff to amend in this respect and give particulars. In the Court of Appeal she was required to support these particulars by affidavit, and upon this footing the Court of Appeal proceeded to discuss the case. The Court was of opinion that none of the particulars alleged were particulars of special damage in the proper meaning of the term and therefore that the action must fail, and gave judgment for the executors.

In the course of the case the whole matter of survival of such a cause of action was discussed at large both in the arguments and in the judgment. It is said, and truly said, on behalf of the plaintiff that the fact that the Court allowed the discussion of the particulars indicates that in their view, if special damage could be proved, the action would lie. On the other hand there is much in the judgment of Lord Esher to show how reluctant he was to allow any such action at all. Indeed he says, 20 Q. B. D. 499: "I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action." But Bowen, L. J., delivering the opinion of himself and Fry L. J., appears finally to express the rule of law as follows, Ibid. 507: "It would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation

for a temporal and measurable loss flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case." Speaking with respect, it is difficult to see any principle which underlies the rule thus laid down. If actions for breach of promise are to be likened to actions of tort, no damages are recoverable against the estate of the dead tortfeasor. If they are to be likened to other actions of contract, the estate of him who has broken his contract and died is as responsible as he himself was when living. It might be possible to rule out those enhanced damages which the conduct of the promise-breaker may subject him to by way of aggravation. They might be considered as arising out of a quasi-tort. It might even be possible to rule out damages which otherwise would be awarded to the living plaintiff for injured feelings, loss of reputation, and injury to bodily health. But some damage is supposed to arise from every breach of contract, even though it be only forty shillings. And I should have thought that the loss of the support and maintenance which a well-to-do husband or a wealthy wife would have afforded was a damage capable of being estimated in money. I should have been glad if Lord Esher had followed his own judgment, and if the other members of the Court had concurred with him. But for the purposes of this case, without desiring to express any opinion of my own, I am content to take it to be the law that in this case an action would lie for special damage.

This leaves a question on which I have no doubt, and which can shortly be disposed of. Is there any allegation or proof in this case of such special damage in the true sense of the words, or — to put the case one step further — is there any allegation of special damage flowing from the breach of promise to marry? Special damage does not mean conduct of aggravation which, under the peculiar rules applicable to this class of action, may be allowed to enhance the damages, as in the cases of *Berry* v. *DaCosta*, L. R. 1 C. P. 331, and *Millington* v. *Loring*, 6 Q. B. D. 190. It means damages which lie in the per quod and for loss to the estate of the plaintiff. Assuming for the purposes of this case that there was some evidence that the plaintiff suffered loss by giving up her milliner's business, this loss did not arise from the breach of the promise to marry. It was not something which she gave up or lost because the man refused to marry her; it was something which she agreed to give up in order to induce him to marry her, something by which she bought, as it were, his promise.

The only way in which this matter of giving up her business could properly be introduced into the case at all was as an item of some assistance to the jury in measuring the damages they were to give. If it was worth her while to give up this business in order

to get the man to marry her, it might be suggested that her loss by reason of his refusal was at least as great. No doubt Lord Esher, in one passage in his judgment where he is, as it were, thinking aloud, 20 Q. B. D. 501, suggests that a claim of this kind might be special damage. But he goes no further, and the expression is, I think, only used for the purpose of showing that the claim in that case did not get so far. The judgment of Bowen and Fry L.JJ. gives the rule. The loss must be one "flowing directly from the breach or within the contemplation of both parties at the death of the promise."

It was lastly suggested that some help would be given to the plaintiff by the words "within the contemplation of both parties." This is a mistake. Those words are an alternative to the adverb "directly." The loss must either be one which arises directly, that is, naturally and ordinarily and as one would expect, from the breach, or it must be one which, though it would not always or naturally follow from the breach, was known to both parties as likely in the peculiar circumstances to arise upon the breach. The words do not give a new fountain for damages, but only a new channel. This is made plain, if it were necessary to be made plain, by the language of the same great judge only a few months afterwards in the case of *The Argentino*, 13 P. D. 191, 200: "Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law superadds in the case of a breach of contract (or, to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of."

Assuming, therefore, that an action for breach of promise of marriage will lie against the executor of a deceased promisor to recover special damage occurring to the estate of the plaintiff by reason of the breach of promise, no such damage was alleged or proved in this case, and therefore the action fails, and the principal appeal must be dismissed. . . .

[SWINFEN EADY, L. J., concurred because there was no corroboration of the plaintiff's evidence, and because no action for breach of promise of marriage lay in any case after the death of the promisor. PICKFORD, L. J., concurred because the loss to the plaintiff by reason

of her having given up her business was not special damage resulting from the breach and was therefore not recoverable. — Ed.][1]

JENKINS *v.* FRENCH ET AL., ADMINISTRATORS.

58 N. H. 532. 1879.

ASSUMPSIT. The question reserved was, whether this action could be maintained against the administrators for unskilful treatment of the plaintiff by the deceased.

STANLEY, J. The precise point here presented has been decided in *Vittum* v. *Gilman*, 48 N. H. 416, and we find no good reason to doubt the correctness of that decision.

It is conceded that if the action were in tort it could not be maintained; but the plaintiff claims that, being in contract, a different rule prevails.

The general doctrine, to which this case forms no exception, is, that actions for the redress of personal injuries only do not survive, and this without regard to the form. It is true, as a general proposition, that actions in form *ex contractu* survive, but this is due rather to the substance of the action than to its form. There are actions, such as arise from the negligence of an attorney, or of a coach proprietor, where the plaintiff seeks to recover damages, which survive, but in these the primary cause of complaint is the injury to property and rights of property, and the personal injury is incidental. The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental. This distinction is recognized in all the authorities. Broom Max. 702; Com. Dig. "Administration," B. 15; *Hambly* v. *Trott*, Cowp. 375; *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Stebbins* v. *Palmer*, 1 Pick. 71; *Smith* v. *Sherman*, 4 Cush. 408; *Wade* v. *Kalbfleisch*, 58 N. Y. 282, 285, 287; *Lattimore* v. *Simmons*, 13 S. & R. 183; Chitty Pl. 67, 90; Bouv. Inst. 2755, 2756.

In the present case, there is no suggestion of injury to the property or property rights of the plaintiff. Her only complaint is of her personal injuries by the unskilfulness of the deceased, and the action cannot be maintained. *Case discharged.*

FOSTER, J., did not sit: the others concurred.[2]

[1] Compare *Johnson* v. *Levy*, 118 La. 447; *Stebbins* v. *Palmer*, 1 Pick. 71; *Chase* v. *Fitz*, 132 Mass. 359; *Cooper* v. *Cooper*, 174 Mass. 370; *Wade* v. *Kalbfleisch*, 58 N. Y. 282; *Price* v. *Price*, 75 N. Y. 244; *Finlay* v. *Chirney*, 20 Q. B. D. 494.

As to whether the death of a divorced husband affects his obligation to pay alimony, see *Knapp* v. *Knapp*, 134 Mass. 353; *Van Ness* v. *Ransom*, 215 N. Y. 557, *ante*, p. 463; *Martin* v. *Thison*, 153 Mich. 516; *Hassaurek* v. *Markbreit*, 68 Ohio St. 554; *In re Stillwell*, [1916] 1 Ch. 365.

[2] *Wolf* v. *Wall*, 40 Ohio St. 111, *accord*. And see *Boor* v. *Lowrey*, 103 Ind. 468.

COKER, Administrator *v.* CROZIER.

5 Ala. 369. 1843.

Error to the Circuit Court of Cherokee.

This was an action on the case, brought by the defendant in error, against the intestate of the plaintiff in error, to recover damages for a fraud in the exchange of horses.

Pending the action, the defendant died, and the cause was revived against the plaintiff as his administrator. The jury having found a verdict against the defendant for eighty dollars, judgment was rendered against him for the damages and costs.

The assignments of error, are,

1. The revival of the judgment against the plaintiff in error.
2. The rendition of judgment against him.

Ormond, J. The common law maxim that personal actions die with the person, has been modified in England, by the act of 4 Edward 3, c. 7, and in this state by the statute to be found in Aik. Dig. 260, Sec. 6. "All actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the plaintiff or plaintiffs die, be revived by his, her or their representatives, in the same manner as actions on contracts."

In the case of *Nettles* v. *Barnett* 8 Porter, 181, we held that this statute did not authorize the revival of a suit, brought for a trespass *de bonis asportatis* against the administrator of the *defendant*, who died pending the suit, but was confined to the case of the death of plaintiffs. We entertain but little doubt that the action brought in this case is within the equity of the statute, though not within its terms, as the established construction of the act of 4th Edward, at the present day is, that although the word *trespasses* only is used, that it applies to all cases of injury to the personal property of the testator or intestate, in contradistinction to personal wrongs, as slander, or assault and battery, without regard to the form of action. But the remedy by the statute of 4th Edward, is given to the executor of the person injured, and has never been held to extend to the executors of the wrong doer. *Wheatly* v. *Lane*, 1 Saunders, 216, note 1. So, by our statute, the action may be revived in the name of the executor or administrator of the *plaintiff*, if he dies pending the suit, and we have already shown, that by the decision of this court, in the case cited, that in regard to those actions enumerated in the statute, the action cannot be revived against the representative of the defendant.

The action in this case is clearly within the common law rule, and not being provided for by statute, upon the death of the defendant the right of action was gone, and could not be revived against his representative. The judgment must therefore be reversed.[1]

[1] And see *Newsom* v. *Jackson*, 29 Ga. 61.

ARNOLD *v.* THE EXECUTORS OF LANIER.

1 Car. Law Repository (N. C.) 529.

THE plaintiff declares in deceit, for, that defendant's testator sold to him, as sound, a negro, which he knew to be unsound. The defendant pleads that her testator was not guilty, and that she had fully administered, etc. The jury found her testator guilty, assessed damages, and that she had fully administered. It is referred to the Supreme Court to say what judgment shall be entered. The plaintiff wishes to proceed against the real estate.

SEAWELL, J., delivered the opinion of the court.

The Act of 1799, c. 18, Sec. 5, declares that no action of detinue or trover, or action of trespass, where property, either personal or real, is in contest, and such action of trespass is not merely vindictive, shall abate by the death of either party. This is an action of trespass, though not *vi et armis*, and the passions and feelings have no concern. It is, in substance, to recover for an act done by the defendant's testator, whereby he has been made richer, and the present plaintiff poorer.

Wherefore, we are all of opinion that the plaintiff is entitled to judgment, and that *scire facias* be awarded against the testator's heirs and devisees.[1]

READ ET AL. *v.* HATCH.

19 Pick. (Mass.) 47. 1837.

THIS was an action on the case, brought by the plaintiffs, merchants in Boston, against the defendant, who resided in Bangor, Maine, charging that the defendant falsely and fraudulently recommended another person as a trader in good credit and worthy to be intrusted with goods, by means of which the plaintiffs were induced to sell him goods on credit, and thereby sustained damage.

At or before March Term 1836, the defendant pleaded in abatement the pendency of an action for the same cause, in the State of Maine; to which plea there was a general demurrer; and the cause then stood for argument.

Subsequently to the 1st of May, 1836 (when the Revised Statutes took effect), the defendant died, and the plaintiffs moved to cite in his administrator.

SHAW, C. J. The question whether the plaintiffs can cite in an administrator and proceed with their action, depends on Revised

[1] In the following cases under modern statutes the action for deceit was held to survive against the personal representative. *Henderson* v. *Henshall*, 54 F. R. 320; *Cutter* v. *Hamlin*, 147 Mass. 471; *Tichenor* v. *Hayes*, 41 N. J. L. 193; *Brackett* v. *Griswold*, 103 N. Y. 425 (conspiracy to defraud). Compare *Reynolds* v. *Hennessey*, 17 R. I. 169.

Stat. c. 93, Sec. 7. It is contended that a false representation, by which one is induced to part with his property, by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction, and not conformable to the intent of the Statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage *done* to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate.

The action is abated at common law, by the death of the defendant, and not surviving by force of the Statute, must be deemed to stand abated.[1]

DAVIS *v.* NICHOLS.

54 Ark. 358. 1891.

COCKRILL, C. J. Curtner killed Nichols in a personal altercation. Nichols' widow, as administratrix of his estate, brought this suit against Curtner to recover damages. The complaint alleged that, "on the 22d day of January, 1886, the defendant, W. H. Curtner, wrongfully did assault, shoot and wound the said J. F. Nichols, her intestate, whereof the said J. F. Nichols languished and languishing did die" on the 23d of January, 1886. It was further alleged that the plaintiff was the widow and next of kin of the deceased, that as such she was damaged in a large sum, and judgment was prayed for that sum and for general relief. Pending the suit Curtner died. The question is, Can the cause be revived against his administrator? The action would have abated at common law, and must abate now unless the statute has changed the common law rule. The only provisions of the law bearing upon the question are Secs. 5223–6 to Mansfield's Digest. The first two of these sections are taken from an act of 1838, and relate to the revivor of actions *ex delicto;* the others are from the act of 1883, and confer upon the personal representative of the deceased a right of action for his death when it is caused by wrongful act, neglect or default — to be prosecuted for the benefit of the widow and next of kin.

It is plain that whatever cause of action J. F. Nichols had against

[1] In the following cases under modern statutes the action for deceit was held not to survive against the personal representative. *Henshaw* v. *Miller*, 17 How. (U.S.) 212; *Jones* v. *Ellis*, 68 Vt. 544; *Boyles* v. *Overby*, 11 Gratt. 202; *Lane* v. *Frawley*, 102 Wis. 373. Compare *Stebbins* v. *Dean*, 82 Mich. 385.

Curtner survived to his administrator by virtue of Sec. 5223 referred to above and hereinafter copied. *Ward* v. *Blackwood*, 41 Ark., 295; *Davis* v. *Railway*, 53 *ib.*, 117. The terms of the section are specific also to the effect that the cause should survive in favor of Nichols' estate against Curtner's administrator. It is plain, too, that, had Curtner lived, he would have been liable to an action by Nichols' administrator for the benefit of his widow and next of kin, by virtue of Secs. 5225–6. But he is dead; and the question is, Did the court err in permitting the cause to be prosecuted to judgment against his administrator for the benefit of the widow and next of kin?

The statute under which that branch of the suit was maintained authorizes an action against a wrong-doer, but it is silent as to the administrator of the wrong-doer; and unless the provisions of the statute first cited cure the defect, the action must abate under the familiar rule of the common law that the wrong-doer and the wrong are buried together. The question has arisen frequently under statutes which like ours are modeled after Lord Campbell's act, and it has been invariably decided against the right of revivor. *Hegerich* v. *Keddie*, 99 N. Y., 258; *Moe* v. *Smiley*, 125 Pa. St., 136; *Russell* v. *Sunbury*, 37 Ohio St., 372; *Green* v. *Thompson*, 26 Minn., 500; *Hamilton* v. *Jones*, 25 N. E. Rep. (Ind.), 192.

The courts were driven to that conclusion in the cases cited, because it was found that the common law rule as to the survivability of actions had not been changed by legislation — the duty of the courts being to declare the law and not to make it.

The section of the statute from the act of 1838 already referred to is as follows, viz.: "For wrongs done to the person or property of another, an action may be maintained against the wrong-doers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong-doer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts." It will be observed that this section provides that wrongs to persons or property shall be actionable, but that is only an affirmance of the common law. It does not therefore create a new cause of action or liability. It simply devolves an existing common law right or liability upon the administrator. To that extent it abolished the common law. The "injury to the person" mentioned in the provision has been construed to mean a bodily injury or damage of a physical character and no other *Ward* v. *Black*, 41 Ark., *supra;* and the injury to property, so far as it relates to personal property, is such only as was contemplated by the statute of 4 Edward III, c. 7, on the same subject. *Russell* v. *Sunbury*, 37 Ohio St., *supra;* *Witters* v. *Foster*, 26 Fed. Rep., 737.

Whether the wrong is a physical injury to the person or an injury to property, the manifest intention is to do nothing more than prevent a subsisting cause of action from abating by the death of a party.

The meaning of the legislature is not changed, but may be more plainly seen, by turning the section into this form, viz.: "When one who is entitled to maintain an action for an injury to his person or property dies, the action shall survive to his administrator; and if the wrong-doer dies, it shall survive against his administrator."

But the cause of action which survives to the administrator upon the death of one who has received a physical injury does not inure to the benefit of the widow and next of kin. The action which is prosecuted for their benefit is not founded on survivorship, but is a new cause of action which death itself originates. It begins where the action which survives ends. *Davis* v. *Railway*, 53 Ark., *supra*. Many cases illustrating different phases of the question may be found in the authorities referred to in *Davis* v. *Railway*.

The case of *Hegerich* v. *Keddie*, 99 N. Y., *supra*, is a case in point upon the question for decision. This suit was brought for damages for the death of the plaintiff's intestate against the administrator of the wrong-doer. It seems that the suit was for the benefit of the estate as well as of the widow and next of kin. The statute of revivor construed by the court was couched in the same language as Sec. 5223, Mansf. Dig., except that it does not embrace injuries to the person, and where the word "property" appears in our statute, the broader term "property rights or interests" is substituted. Of this statute the court said: "The wrongs referred to in these sections are such only as are committed upon the 'property rights, or interests' of the testator or intestate, and to the cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action." And in speaking of the remedy under a statute similar to our act of 1883, the opinion continues: "The cause of action here provided for does not purport to be a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. *Whitford* v. *Panama R. R. Co.*, *supra*.

"It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

"The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by, representatives."

What is there said of the injury to "property rights or interests" applying only to a derivative action is applicable as well to an injury to the person under our statute.

It follows that the action cannot be revived upon the theory that it is an injury to the person within the meaning of Sec. 5223. The case just quoted is authority also to the proposition that it cannot be revived under that section either as an injury to the "property" of the decedent or of his widow and next of kin.

In *Vertore* v. *Wiswall*, 16 How. Pr., 8, it was held by the Supreme court of New York that an action for the benefit of a widow to recover damages of a common carrier for negligently causing the death of her husband was a suit for an injury to her property interests within the meaning of the statute, and that the action survived the death of the wrong-doer; but the decision was overruled by the court of appeals in *Hegerich* v. *Keddie*, 99 N. Y., *supra;* and the doctrine of *Vertore* v. *Wiswall* has been repudiated, as we are advised, wherever the question has arisen. *Russell* v. *Sunbury*, 37 Ohio St., *supra; Hamilton* v. *Jones*, 25 N. E. Rep., *supra; Moe* v. *Smiley*, 125 Pa. St., *supra; Ott* v. *Kaufman*, 68 Md., 56.

These cases clearly show that the right of the widow to recover damages for the death of her husband is not based upon an injury to property within the meaning of the statute.

It follows that the action prosecuted for the benefit of the widow abated upon the death of Curtner, the wrong-doer, and that the court erred in permitting the plaintiff to proceed to judgment against his administrator for her benefit. For this error the judgment must be reversed.

But the complaint stated a cause of action in Nichols himself which survived to his administratrix, and she is entitled to prosecute it for the benefit of his estate.

Reverse and remand for a new trial.[1]

[1] In the following cases the action for causing death was held not to survive the death of the wrongdoer. *Hamilton* v. *Jones*, 125 Ind. 176; *Green* v. *Thompson*, 26 Minn. 500; *Bates* v. *Sylvester*, 205 Mo. 493; *Hegerich* v. *Keddie*, 99 N. Y. 258; *Russell* v. *Sunbury*, 37 Ohio St. 372; *Moe* v. *Smiley*, 125 Pa. 136; *Johnson* v. *Farmer*, 89 Tex. 610. Compare *Beavers* v. *Putnam*, 110 Va. 713. A contrary result was reached in *Devine* v. *Healey*, 241 Ill. 34; *Moorehead* v. *Bittner*, 106 Ky. 523; *Merrill* v. *Puckett*, 93 S. W. (Ky.) 912.

SECTION II.

PRESENTATION OF CLAIMS.[1]

JONES' EXECUTORS *v.* LIGHTFOOT.

10 Ala. 17. 1846.

ORMOND,. . . J.[2] This principle was considered as of too much moment to be passed over, but it becomes wholly unimportant, upon the further investigation of the cause, because we think the statute of *non-claim*, interposed by way of plea by the executors, is an effectual bar to the revival of the suit against them.

The act declares, that "all claims shall be presented to the executor, or administrator, within eighteen months after the same shall have accrued, or within eighteen months after letters testamentary, or letters of administration, shall have been granted to said executor or administrator, and not after; and all claims not presented within the time aforesaid, shall be forever barred from a recovery." The act contains a saving clause as to infants, etc., which does not apply to this case. Clay's Dig. 195, Sec. 17.

The question to be decided is, what is meant by a *presentment* of the claim, to the executor or administrator?

If knowledge merely, of the existence of the claim by the personal representative is sufficient, in any conceivable case, (except where the debt is due to the personal representative himself), it must be in this. The executors are the sons and heirs of the deceased, and it is clear from the proof, that they were perfectly aware of its existence, as they had consulted counsel about it. But in our opinion, knowledge merely of the existence of the claim is not sufficient, and to hold that it was, would be in effect to repeal the statute.[3] At least it would introduce so many exceptions to the rule, that the rule itself would be rendered nugatory. The statute is in effect, a statute of limitations, passed as much for the benefit of the heir, and distributee, as of the personal representative, and to secure the

[1] And see Chapter X, Sec. V.

[2] The statement of facts and part of the opinion are omitted.

[3] *Dime Bank* v. *McAlenney*, 76 Conn. 141; *Bush* v. *Adams*, 22 Fla. 177; *Morse* v. *Pacific Ry. Co.*, 191 Ill. 356; *Madison Bank* v. *Suman*, 79 Mo. 527; *Vandyke* v. *Chandler*, 5 Halst. 49, *accord*. *Miller* v. *Trustees of Jefferson College*, 5 Sm. & M. 651 (notice from record of mortgage); *Perry* v. *West*, 40 Miss. 233; *Edwards* v. *King*, 7 S. C. 370, *contra*.

When the personal representative is also the creditor the claim need not be presented. *Brown* v. *Brown*, 56 Conn. 249; 58 Conn. 85; *State* v. *Reigart*, 1 Gill 1; *Brown* v. *Greene*, 181 Mass. 109; *McLaughlin* v. *Newton*, 53 N. H. 531; *Thomas* v. *Chamberlain*, 39 Ohio St. 112. *Estate of Taylor*, 16 Cal. 434; *Wright* v. *Wright*, 72 Ind. 149; *Clark* v. *Talman*, 68 Iowa, 372; *Farrow* v. *Nevin*, 44 Oreg. 496; *Bryon* v. *Fleming*, 3 Head 658; *Riley* v. *McInlear*, 61 Vt. 254; *Hayes Estate*, 98 Atl. (Vt.) 45, *contra*.

speedy settlement of estates; and is as obligatory in a court of chancery, as at law. It is emphatically a statute of repose, and includes judgments, to which the administrator is not made a party, as well as any other demand. *Thrash* v. *Sumwalt*, 5 Ala. 13. The plain and obvious design of the statute was, to enable distributees, and legatees, to demand a distribution of the estate, at the expiration of eighteen months from the grant of letters, unless it was necessary for the executor, or administrator, to retain it longer in his hands, for the purpose of paying debts. To justify him in so doing, he must be furnished with the evidence that claims exist against the estate, and will be enforced. This evidence the statute requires, to be a *presentment* of the claim, and in our opinion, nothing short of an actual presentment will satisfy its demand.

The service of a *scire facias* upon the personal representative to revive a judgment, or a suit in progress within the eighteen months after the grant of letters, would doubtless be a presentment of the claim.[1] The effect of the attempt to revive this suit, by *scire facias*, instead of by bill of revivor, need not be considered, as it was never executed or returned. The bill of revivor was not filed, until after the expiration of the time for the presentation of claims; the plea therefore, of the executors, of the statute of non-claim, is fully sustained by the record, as it is not pretended there was a presentation in fact made.

At an early period, this court held, that a suit commenced against the personal representative, within eighteen months, to which the plaintiff submitted to be non-suited, was not a sufficient presentment of the claim. That the statute required an actual presentment, and the mere service of a writ, afterwards abandoned, was not a *presentment*. *Bigger, Adm'x* v. *Hutchings and Smith*, 2 Stew. 448. This case has been acquiesced in from that time to the present; at least it has not been judicially questioned, except in the case of *Garrow* v. *Carpenter and Hanrick*, 1 Porter, 374. But it is to be observed, that the facts of this last case, were entirely dissimilar, and although some doubt is intimated about the propriety of the decision in 2 Stewart, the court expressly disclaimed any intention of overruling it. The leading principle of the case, that there must be an actual presentment of the claim within eighteen months, or something done by the party equivalent to it, is admitted. Whether the commence-

[1] *Malone* v. *Hundley*, 52 Ala. 147; *Eddins* v. *Graddy*, 28 Ark. 500; *Anderson* v. *Agnew*, 38 Fla. 30; *O'Donnell* v. *Hermann*, 42 Iowa 61; *Musser* v. *Chase*, 29 Ohio St. 577; *Megrath* v. *Gilmore*, 15 Wash. 558, *accord*. *Frazier* v. *Murphy*, 133 Cal. 91; *United States* v. *Hailey*, 2 Idaho 22, *contra* (by statute). Compare *Cochran* v. *Whittaker*, 10 Ky. L. R. 495.

The institution by the creditor of a suit against the executor or administrator within the statutory period is a sufficient presentment. *Freeman* v. *Pullen*, 119 Ala. 235; *Clark* v. *Shelton*, 16 Ark. 474; *Scheel* v. *Eidman*, 68 Ill. 193; *Madison Bank* v. *Suman*, 79 Mo. 527; *Ryans* v. *Boogher*, 169 Mo. 673; *McLeod* v. *Graham*, 132 N. C. 473. See *O'Donnell* v. *Hermann*, 42 Iowa 60; *Newbold* v. *Fenimore*, 53 N. J. L. 307, *contra*.

ment of a suit against the personal representative, to which a nonsuit was taken, was such an equivalent, the court in the case cited from 1 Porter, were not called on to decide; nor are we, as nothing was done here, but to suggest the death of the testator, and the suing out of a *scire facias*, which was neither executed or returned. The 15th rule of practice Clay's Dig. 613, applies to cases where no answer is required from the personal representative, and authorizes the register to revive the suit, if no cause is shown to the contrary, when the process is returned executed. It is clear this ineffectual effort to revive the suit, cannot be considered as a substitute for a presentment of the claim. . . .

KITTREDGE *v.* NICHOLES ET AL.

162 Ill. 410. 1896.

MR. CHIEF JUSTICE CRAIG delivered the opinion of the court:[1]

This was a bill to foreclose a trust deed executed July 20, 1880, by William C. Gibbons and Ellen Gibbons, his wife, to Daniel C. Nicholes, trustee, on a certain tract of land in Cook county, to secure a promissory note which they executed on the same date, for $500, payable to the order of Sydney L. Darrow in three years after date, with interest at the rate of eight per cent per annum, payable semi-annually. The trust deed was properly acknowledged by the grantors therein, and on the 12th day of August, 1880, recorded in the recorder's office of Cook county.

William C. Gibbons died in Chicago February 27, 1883, and letters of administration upon his estate were granted to Ellen Gibbons, his widow, August 6, 1883, by the probate court of Cook county. The real estate conveyed by the trust deed was inventoried by the administratrix as part of the assets of Gibbons' estate, within two years after the date of her letters of administration, but the indebtedness represented by the note and trust deed was not presented as a claim against the estate in the probate court of Cook county or elsewhere. It is not claimed that the debt secured by the deed of trust was ever paid, but two of the defendants to the bill set up in their answer, as a defense, that Ellen Gibbons, administratrix of the estate of W. C. Gibbons, by proper proceeding in the probate court of Cook county, in pursuance of the statute in that behalf, caused the premises in the trust deed to be sold to pay debts, to which proceeding Sydney L. Darrow and Daniel C. Nicholes, above named, were made parties and entered their appearance but suffered a default, and said premises were sold free from the lien of said trust deed, if any there was. Defendants, further answering, state that all rights which complainants may ever have had, either

[1] Only part of the opinion is given.

in their own right or otherwise, were barred by the Statute of Limitations.

It is claimed in the argument that appellees cannot maintain a bill to foreclose the deed of trust upon two grounds: First, they are barred because the claim was not exhibited to the probate court for allowance within two years from the time letters of administration were granted on the estate of William C. Gibbons, deceased; second, because the appearance of Darrow, the holder of the note, and Nicholes, the trustee, in the proceedings to sell real estate to pay debts by the administratrix of the estate of Gibbons and consenting that their default be entered, operated as an estoppel in this suit.

The seventh clause of Sec. 70, c. 3, of Hurd's Statutes of 1895, provides: "All other debts and demands, of whatever kind, without regard to quality or dignity, shall be exhibited to the court within two years from the granting of letters, as aforesaid, and all demands not exhibited within two years, as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator." This statute has been in force in this State for a number of years, but it has never been understood that it was intended to operate as an absolute bar to a recovery on a claim which was not exhibited to the probate court within two years from the granting of letters. Where a claim has not been exhibited within two years, the party holding the claim may bring an action upon it and recover judgment, but the judgment can only be satisfied out of property belonging to the estate which has not been inventoried. *Bradford* v. *Jones*, 17 Ill. 93; *Judy* v. *Kelley*, 11 id. 211. In other words, under the statute a party who fails to exhibit his claim to the probate court within two years is prohibited from sharing in a division of the assets of the estate which were inventoried as provided by the statute.[1] Here, Sydney L. Darrow, the holder of the note against William C. Gibbons, secured by deed of trust on real estate, had two remedies for the collection of his debt. One was an ordinary action at law on the note; the other, a bill in equity to foreclose the mortgage. He was at liberty to resort to these remedies separately, or both might be maintained at the same time, as the creditor might elect. The right to sue at law on the note and the right to foreclose the mortgage or deed of trust were concurrent rights, and these rights remained the same after the death of Gibbons. *Furness* v. *Union Nat. Bank*, 147 Ill. 570. Upon the death of Gibbons, Darrow, the holder of the note and deed of trust, was at liberty, if he desired, to probate his note against the estate in the probate court, or he might decline to pursue that course and rely solely upon his deed of trust. The fact that he failed to exhibit his claim in the probate court within two years after letters of administration were granted

[1] For the different rules on the effect of not presenting a claim within the period of the statutes of nonclaim, see 2 Woerner, Am. Law of Adm. (2d ed.), § 403.

had no effect whatever on his right to pursue the other remedy conferred by law, — the right to foreclose the deed of trust. . . .

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.[1]

SHERMAN ET AL. *v.* WHITESIDE ET AL.

190 Ill. 576. 1901.

APPEAL from the Appellate Court for the Second District; — heard in that court on appeal from the Circuit Court of McHenry county; the HON. CHARLES E. FULLER, JUDGE, presiding.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:[2]

John Whiteside filed his claim in the county court of McHenry county against the estate of Zebulon E. Goodrich, deceased, on December 6, 1897, the day fixed for filing claims, for $3091.53, "balance due for services, care, nursing and attention from August 1, 1891, to August 8, 1897," the latter being the date of the death of said Goodrich. V. S. Lumley and George K. Bunker, the executors of the will of said Goodrich, objected to the allowance of the claim and employed an attorney to defend against it. It was continued to the next term and tried January 5, 1898, upon depositions and oral evidence, both parties being represented at the trial, and the court rendered judgment allowing the claim for the sum of $3021. On February 11, 1899, appellants, who are a portion of the legatees, filed their petition in the county court in this case against the appellees, the said claimant and executors, praying that the allowance of the claim be set aside and for a new trial thereof, that Whiteside be adjudged indebted to the estate, and that the amount of his indebtedness be ascertained and deducted from the legacy given him and the legacy be declared paid and canceled. The petition was amended and the court sustained a demurrer to the amended petition and dismissed it. The appellants took the case to the circuit court by appeal, where the demurrer was overruled and the petition was answered by appellees, and the appellee Whiteside also filed two special pleas. Upon a hearing of the issues the circuit court dismissed the petition, and the Appellate Court has affirmed the decree of dismissal.

The testator, Zebulon E. Goodrich, had never been married. By

[1] *Smith* v. *Gillam*, 80 Ala. 296; *Anglo-Nevada Co.* v. *Nadeau*, 90 Cal. 393; *Reid* v. *Sullivan*, 20 Colo. 498; *Beach* v. *Bell*, 139 Ind. 167; *Allen* v. *Moer*, 16 Iowa 307; *Andrews* v. *Morse*, 51 Kan. 30; *Tucker* v. *Wells*, 111 Mo. 399; *Fisher* v. *Mossman*, 11 Ohio St. 42; *Fish* v. *DeLaray*, 8 S. D. 320 (mechanics' lien); *Hurlbert* v. *Brigham*, 56 Vt. 368 (attorneys' lien); *Edgerton* v. *Schneider*, 26 Wis., 385, *accord*. *Bush* v. *Adams*, 22 Fla. 177; *Wilson* v. *Harris*, 91 Tex. 427, *contra*.

But there will be no deficiency judgment if the mortgage claim is not duly presented. *Roberts* v. *Flatt*, 142 Ill. 485; *Colby* v. *King*, 67 Iowa 458; *O'Keefe* v. *Foster*, 5 Wyo. 343, and cases cited in the preceding paragraph.

[2] Part of the opinion is omitted.

his will he gave a great number of specific legacies to different persons, among whom were the appellee John Whiteside and the appellants. He left personal estate to the amount of about $35,000 and real estate to the value of about $18,000. The will provided that after the payment of the legacies, amounting to $24,200, and the testator's debts and funeral expenses and costs of administration, the residue should be set off to the legatees in the same ratio as each specific legacy should bear to the whole amount bequeathed to all. Appellants are interested in the estate as legatees entitled to shares of the residue, and have such a standing in court as to enable them to institute the proceeding to set aside the allowance of a claim procured through fraud. The county court has such equitable jurisdiction in the administration of estates that it may in a proper case, on motion, at a subsequent term set aside an order allowing a claim where fraud or mistake has intervened. *Schlink* v. *Maxton*, 153 Ill. 447. The facts alleged and proved to enable the court to set aside the claim must be such as would move a court of equity to entertain jurisdiction and set aside the judgment.

In this case the personal estate is sufficient to pay all the debts, including this claim and all the legacies, and there will be no occasion to resort to real estate for their payment. In the absence of fraud, the judgment of the county court allowing the claim is conclusive against both the executors and the legatees in respect to the personal estate. If an executor has been delinquent in his duty the persons interested in the estate have their remedy on his bond, but a claimant cannot be forced to litigate his claim first with the executor and afterward with the legatees, or with heirs, where there is no attempt to subject real estate which has descended to the heirs to the payment of the claim. This is conceded by appellants, who acknowledge that it was necessary, in order to set aside the allowance and entitle them to a new trial, for them to prove that the claim was allowed by fraud or fraudulent collusion with the executors, and not through mere negligence of such executors. *Ward* v. *Durham*, 134 Ill. 195; *Gold* v. *Bailey*, 44 id. 491.

[The learned judge then considered the evidence of fraud and continued as follows: — ED.]

The argument that Whiteside was guilty of fraud in presenting a groundless, trumped-up claim is not sustained by the evidence, nor is there anything tending to show that he was in collusion with the executors in any way in the allowance of the claim. . . .

There are many complaints against the conduct of the executors in relation to other matters which, it is claimed, have some bearing on the charges made in this case. The complaints are such as occasionally arise in the administration of estates, such as failing to notify appellants who lived in other States when the personal chattels would be sold, so that they could purchase some of their grandparents' relics; opposing the devisees in a partition suit and delaying

the suit, and other like matters. These complaints are about matters in no way connected with Whiteside's claim, and appellants were not entitled to make proof of them. For the delinquencies of the executors, if there are any, with which Whiteside is not concerned, the remedy is on their bond.

Appellants failed to prove the charges of their petition, and the court was right in dismissing it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.[1]

BASSETT *v.* DREW.

176 Mass. 141. 1900.

CONTRACT, to recover a balance of $1,600 with interest due on a promissory note for $4,000 against the devisee in trust under the will of Russ B. Walker, the maker of the note. Writ dated August 29, 1898. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The note was payable to the order of the plaintiff, dated March 18, 1893, on five years' time, and secured by a mortgage on real and personal property, which on the same day the plaintiff had conveyed to him. Subsequently Walker sold the equity to one who after Walker's decease conveyed it to Walker's widow. Walker died on August 25, 1894, and his widow was appointed administratrix with the will annexed of his property in Maine, where he had lived. She took out ancillary administration in Massachusetts, giving bond in the Probate Court of Suffolk County on May 2, 1895, and published notices of her appointment in compliance with the law.

The property of the deceased in Maine realized $1,159. His property in Massachusetts consisted of real estate appraised at $8,600, and a small amount of personal property. By his will he gave all his property, after payment of a few small legacies, to the defendant in trust.

On July 27, 1897, more than two years after giving bond, the administratrix filed her final account in Suffolk County, and about the same time filed one in Maine. Both accounts were then allowed and the settlement of Walker's estate was complete.

The plaintiff never presented this note to the Probate Court. On November 27, 1897, as Walker's widow, who then held the equity, had made default in payment of interest on the note, the plaintiff foreclosed his mortgage under the power of sale, and purchased the premises himself for $2,600.

[1] *Barber* v. *Bowen*, 47 Minn. 118; *Lewis* v. *Welch*, 47 Minn. 193; *Munday* v. *Leeper*, 120 Mo. 417, *accord*. Compare *Graham* v. *Brock*, 212 Ill. 579, *post*, p. 691: *Estate of Pennock*, 122 Iowa 622; *Mouillerat's Estate*, 14 Mont. 245; *Mason* v. *Taft*, 23 R. I. 38.

This action is to recover the difference between the amount for which the plaintiff had bought in the mortgaged premises and the amount of the mortgaged note.

HAMMOND, J. It is recited in the preamble to St. 1788, c. 66, that theretofore executors and administrators had frequently suffered "great loss and trouble by reason of demands brought against them after they have closed their accounts of administration, and settlement of the estate they have administered is made among the heirs or devisees," and that "for remedy whereof, as well as for the more speedy settlement of estates," the statute is passed.

Prior to this statute there does not seem to have been any statute of limitations applicable only to claims against executors and administrators. See Dane, Abr. c. 29, art. 1. This statute set a time within which actions must be brought against an executor or administrator. It divided the obligations of the deceased into three classes: First, those due and payable within that time; second, those due and not payable within that time; third, all other obligations, including those where the liability depends upon some contingency not happening within that time, and which might never happen.

A claim of the first class not presented within the time was barred, and there could be no recovery against anybody. A holder of a claim of the second class could file his claim in the office of the Probate Court before the expiration of the time, and the judge of probate was directed thereupon to order the executor or administrator to retain in his hands assets to answer the demand unless some one or more of the heirs or devisees should give sufficient security for the executor or administrator to respond to the demand. And in such case, the executor or administrator was not allowed to hold the assets, and the remedy was against the estate of the deceased in the hands of the heirs or devisees or their heirs or assigns.

With certain changes and amendments not material to this discussion the policy thus adopted has continued to the present time. St. 1791, c. 28. St. 1792, c. 33. Rev. Sts. c. 66, §§ 3, 5; c. 70, §§ 13, 14. St. 1852, c. 294, § 1. Gen. Sts. c. 97, §§ 5, 8; c. 101, §§ 31, 32. Pub. Sts. c. 136, §§ 9, 13, 26, 27.[1]

[1] Massachusetts, Pub. Stats. (1882), c. 136, §§ 9, 13, 26, 27, provided as follows:

"SEC. 9. No executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust, except as hereinafter provided."

"SEC. 13. A creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the probate court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of his claim in case it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid. This section, so far as it relates to claims to become

In speaking of this policy and the statutes, *Shaw*, C. J., in *Hall* v. *Bumstead*, 20 Pick. 2, 3, says: "In this Commonwealth, the liability of heirs for the debts of an ancestor, depends wholly upon statute, and is provisional only. * * * Here, it is the policy of the law to make all property liable for all the debts of the deceased owner, and in the first instance to place it under the administration of an executor or administrator; and in pursuance of the same policy, land is made assets provisionally in the hands of the administrator, after the personal property is applied." And again, in the same case, on page 6, he says: "By the policy and provisions of our laws, the remedy of a creditor upon the heirs or devisees of a deceased person, is extremely limited. Every demand which can be made and enforced against the estate of a deceased person, is to be pursued against the administrator where it can be done, and the whole estate, personal and real, is in effect made assets in his hands to meet such claims." See also *Royce* v. *Burrell*, 12 Mass. 395.

In *Pratt* v. *Lamson*, 128 Mass. 528, it was held, in accordance with the plain reading of the statute, that a promissory note maturing after two years from the time of the giving of the bond by the executor is a debt for which provision is made under Gen. Sts. c. 97, § 8, now Pub. Sts. c. 136, § 13, and that the creditor not having presented his claim to the Probate Court, under that section, could not maintain an action thereon under Gen. Sts. c. 101, § 31, against the legatees of the deceased. That case is decisive of this unless a distinction can be made in favor of the plaintiff.

The plaintiff, however, contends that where the personal assets do not appear to be sufficient to pay the claim, or where they are

due, shall not apply to or affect any estate which was in process of settlement on the twenty-eighth day of February in the year eighteen hundred and seventy-nine."

"SEC. 26. After the settlement of an estate by an executor or administrator, and after the expiration of the time limited for the commencement of actions against an executor or administrator by the creditors of the deceased, the heirs, next of kin, devisees, and legatees of the deceased shall be liable, in the manner provided in the following sections, for all debts for which suits could not have been brought against the executor or administrator, and for which provision is not made in the preceding provisions of this chapter."

"SEC. 27. A creditor whose right of action accrues after the expiration of said time of limitation, and whose claim could not legally be presented to the probate court, or whose claim, if presented, has not been allowed, may, by action commenced within one year next after the time when such right of action accrues, recover such claim against the heirs and next of kin of the deceased or against the devisees and legatees under his will, each one of whom shall be liable to the creditor to an amount not exceeding the value of real or personal estate that he has received from the deceased. But if by the will of the deceased any part of his estate or any one or more of the devisees or legatees is made exclusively liable for the debt in exoneration of the residue of the estate or of other devisees or legatees, such provisions of the will shall be complied with, and the persons and estate so exempted shall be liable for only so much of the debt as cannot be recovered from those who are first chargeable therewith." Compare Massachusetts, Rev. Laws (1902), c. 141, §§ 9, 13, 26, 27. By Acts (1914), c. 699, the periods of limitation have been shortened.

merely nominal, it would be useless to order the administrator to do that which he cannot do; that therefore an application under § 13 would be a useless and idle ceremony which the law would not require; and that as the claim could not thus be paid in full it is a claim "for which provisions is not made in" the thirteenth sections, and so is within Pub. Sts. c. 136, §§ 26, 27; and in support of his position he relies upon *Clark* v. *Holbrook*, 146 Mass. 366, and *Forbes* v. *Harrington*, 171 Mass. 386, but in neither of these cases was the question involved. Such a view of the thirteenth section arises from a misconception of the object and legal effect of the proceedings under it.

The object of the proceedings under that section is not to collect the claim presented, for it has not yet become payable, nor even to adjudicate finally the question of its validity, Pub. Sts. c. 136, Secs. 14, 27, but simply to extend the time for its collection beyond the time within which otherwise by the special statute of limitations it would be barred.

Upon such an application, if it appears to the court that the claim is or may become justly due, the court "shall order the executor or administrator to retain in his hands sufficient to satisfy the same." But if a person interested in the estate offers to give a sufficient bond to the alleged creditor for the payment of the claim "in case it is proved due," the court may order such bond to be taken instead of requiring assets to be retained as aforesaid. Section 15 provides that the action shall be brought against the administrator if he has been required to retain assets, otherwise upon the bond.

If the order to retain assets is passed, and in the action against the administrator judgment is recovered by the plaintiff, execution issues therefor against the estate of the deceased, real and personal, in the hands of the administrator, just as in the case of a suit upon an ordinary claim within the two years, and the real property belonging to the estate is assets in his hands for that purpose; and, if the personal assets in his hands are insufficient to satisfy the claim, it is his duty to apply for license to sell and to sell real estate, and to apply the proceeds or so much thereof as may be necessary to the satisfaction of the claim. If the Probate Court refuses to order assets to be retained or a bond to be given, then the creditor, by the plain reading of Pub. Sts. c. 136, § 27, can hold the heirs or devisees answerable, because it is then a case where the claim has been presented under the thirteenth section, and has not been allowed.

An order under § 13 to hold assets, even if there be no personal assets in the hands of the executor or administrator, is not without effect. On the contrary, the legal effect is to hold the executor or administrator answerable for the claim beyond the special statute limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim. It puts the creditor

upon the same ground with reference to the real estate of the deceased as one who has brought suit within the two years. *Hall* v. *Bumstead*, 20 Pick. 2. *Bacon* v. *Pomeroy*, 104 Mass. 577. *Edmunds* v. *Rockwell*, 125 Mass. 363. *Hammond* v. *Granger*, 131 Mass. 351.

In proceedings before the Probate Court under this thirteenth section, "the duty of that court does not involve an inquiry into the present amount of assets, but is limited to examining whether the claim appears to be justly due from the estate, and, if it does so appear, ordering sufficient assets to be retained, or a sufficient bond to be given, for the payment or satisfaction of the claim if subsequently proved to be due in an action at law." Gray, C. J., in *Hammond* v. *Granger*, 131 Mass. 351, 353.

The case cannot be distinguished from *Pratt* v. *Lamson*, *ubi supra*, in any respect material to the questions involved in the present inquiry, and it must therefore follow that case.

Judgment for the defendant affirmed.

ELECTRIC WELDING CO. Limited *v.* FITZ and Others.

SAME *v.* NATHANIEL S. SIMPKINS and Others

215 Mass. 315. 1913.

Two Bills in Equity, filed in the Supreme Judicial Court on February 9, 1912, by a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, to enforce the alleged liability under R. L. c. 141, §§ 26, 27, of the respective devisees and legatees under the wills of two deceased subscribers for shares of the capital stock of the plaintiff, for a payment of £1 a share in accordance with a call made by the plaintiff's directors.

The defendants in each case demurred to the bill. The cases were heard by Morton, J., who sustained the demurrers, and made final decrees dismissing the bills. The plaintiff appealed. The material facts as alleged in the bills are stated in the opinion.

Rugg, C. J. The plaintiff, an English corporation, seeks to recover a call for a payment of £1 per share upon stock subscribed for by Eustace C. Fitz and John Simpkins respectively, both now deceased, in these suits against their devisees and legatees. Their estates were settled in probate courts in this Commonwealth before the call for payment upon the stock was made. The point to be decided is whether the devisees and legatees of these decedents are liable under R. L. c. 141, §§ 26, 27. The substance of these sections, so far as now material, is that a creditor after the settlement of an estate and whose right of action accrues after the expiration of the special statute of limitations "and whose claim could not legally be presented to the Probate Court," may recover from the legatees or

heirs. It is plain upon the allegations of the bills that the rights of action did not accrue until after the settlement of the estates. The vital question is whether the claims legally could have been presented to the Probate Court. The answer depends upon R. L. c. 141, § 13, which provides in such case that a creditor may present his claim at any time before the estate is fully administered to the Probate Court, and if that "court finds that such claim is or may become justly due from the estate," it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. The precise point is whether the plaintiff's claim, before these estates were fully administered, properly could have been described as one which "may become justly due."

The liability of the estates of these decedents was not a debt upon which action could be brought until a call was actually made by the directors of the plaintiff company. The shareholders' liability was to pay the balance of the uncalled capital when and not until a call was made. *In re Russian Spratt Patent, Ltd.* [1898] 2 Ch. 149. *Alexander* v. *Automatic Telephone Co.* [1899] 2 Ch. 302. The maximum remaining liability of the decedent subscribers was £4 per share at the time the call for the £1 per share here in suit was made. The statute in question has been before the court for construction and application in several cases. It has been said that the whole "statute must be construed reasonably. It cannot have been intended to enable any one, who has an outstanding contract made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due upon the contract, and when it still is impossible for the Probate Court to form any estimate of what amount should be retained as 'sufficient to satisfy the same,'" *Bullard* v. *Moor*, 158 Mass. 418, 424; and that "the settlement of the estates of deceased persons should not be unnecessarily delayed." *Forbes* v. *Harrington*, 171 Mass. 386, 391. Yet it also has been said that "the language of the statute plainly implies that there may be at least some uncertainty as to whether or not the debt may be justly due," *Peabody* v. *Allen*, 194 Mass. 345, 347; and that its "legal effect is to hold the executor or administrator answerable for the claim beyond the special statute limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim," *Bassett* v. *Drew*, 176 Mass. 141, 145; and that its purpose is not to enable the Probate Court to determine how much is due nor to collect the claim if it is not yet due. *Converse* v. *Nichols*, 202 Mass. 270. In the case at bar the public subscription for stock of the plaintiff had failed, and the necessity for and the probability of a subsequent call or calls was better within the knowledge of the plaintiff and its directors than of anybody else. The obligation to pay assessments upon the stock was definite as to the maximum amount, and whether any call should be made and how much it should be depended upon the

action of the directors. Whatever uncertainty existed was one over which the plaintiff's directors had control. It is not practicable to attempt to lay down a general rule which shall govern all cases. As applied to the case at bar, the determining factor under the statute is not the uncertain or contingent character of the claim against the estate, but whether its nature is such that the debtor can present to the Probate Court with a reasonable degree of intelligence a statement of a liability having limits as to amount, some foundation in law and a fair basis of fact in its support. The knowledge which directors may be presumed to have of the condition of their company is such that they could have presented to the Probate Court such a statement of the probable necessity of making a call for payment in whole or in part of unpaid subscriptions to stock. The cases from other jurisdictions relied upon by the plaintiff construe statutes materially different from that before us. The language of our statute contemplates some degree of contingency and uncertainty in the character of the claims which may be found likely to be due. This case is not distinguishable in principle from *Converse* v. *Nichols*, 202 Mass. 270.

Decree in each case affirmed with costs.[1]

[1] Examples of contingent claims which were held so uncertain as not to require presentment are to be found in *Ames* v. *Ames*, 128 Mass. 277; *Bullard* v. *Moor*, 158 Mass. 418; *Forbes* v. *Harrington*, 171 Mass. 386. Compare *Brown* v. *Dunn*, 75 Vt. 264; 58 L. R. A. 82, note.

In some jurisdictions every contingent claim, no matter how uncertain the contingency, must be presented in order to hold the executor or administrator thereon. *Gaston* v. *Roach*, 96 Cal. 467; *Barto* v. *Stewart*, 21 Wash. 605; Idaho, Rev. Codes (1908), § 5463. Compare *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564, *Cornes* v. *Wilkin*, 79 N. Y. 129; Montana, Rev. Codes (1907), § 7658; North Dakota, Comp. Laws (1913), § 8736; Utah, Comp. Laws (1907), § 3851. In others the short statute of limitations does not begin to run until the contingent claim accrues. Gay, Executor, 61 Conn. 445; *Burton* v. *Rutherford*, 49 Mo. 255.

Illustrations of practice approaching that of Massachusetts are to be found in the following references. *Walker* v. *Byers*, 14 Ark. 246; Maine, Rev. Stats. (1903), c. 89, §§ 14–18; *Greene* v. *Dyer*, 32 Maine 460; *Sampson* v. *Sampson*, 63 Me. 328; *Pole* v. *Simmons*, 49 Md. 14; *Berryhill* v. *Peabody*, 72 Minn. 232; *Hunt* v. *Burns*, 90 Minn. 172; Nebraska, Rev. Stats. (1913), c. 17, Art. VII; *Libby* v. *Hutchinson*, 72 N. H. 190; Virginia, Annot. Code (1904), § 2703; Wisconsin, Stats. (1915), §§ 3858-3861; *Schmidt* v. *Grenzow*, 156 N. W. (Wis.) 143; Wyoming, Comp. Stats. (1910), § 5600.

SECTION III.

PRIORITY OF PAYMENT BETWEEN DEBTS.

NOTE.

"The order of paying out the assets is, at common law, as follows: 1. Funeral Expenses. 2. Expenses of probate and administration. 3. Debts due to the Crown by record or specialty. 4. Judgments in courts of record. 5. Recognizances. 6. Specialty debts and rent. 7. Simple debts, *semble*, to the Crown. 8. Simple debts. 9. Voluntary bonds. See 1 Wms. Exec. (10th ed.) 751–798.

"In the United States the priority of payments has been altered by statute. The following order is perhaps the most usual: 1. Funeral expenses and expenses of last sickness. 2. Expenses of administration. 3. Debts due to the United States. 4. Debts due to the State. 5. All other debts; in a few States judgments have precedence. The priority of specialty debts has been almost entirely done away with. See 2 Woerner, Amer. Law of Adm. (2d ed.) §§ 364–374." 4 Gray Cas. on Prop. (2d ed.), p. 557.

Property out of which debts and legacies of the deceased are payable is called assets. Assets are divided into legal assets and equitable assets. Legal assets are of two kinds, real and personal. At common law real estate of a deceased person was not liable for his debts. Specialty debts in which the heir was named were an exception if the land was in the hands of the heir. By Stat. 3 & 4 W. & M., c. 14 this liability was extended to the devisee; and by Stat. 29 Car. II, c. 3, § 12 a similar burden was imposed on estates *per auter vie* in the hands of the heir as special occupant, and, if there were no special occupant, in the hands of the executor or administrator. Legal personal assets are those assets which pass to the personal representative by virtue of his office. See pp. 457–495, *ante*.

"What are equitable assets? The accepted definition seems to be: — Equitable assets are property which is applicable for the payment of the dead person's debts but which is not vested in his personal representative, his executor or administrator, *virtute officii*. It is necessary to be somewhat careful about this matter, for one plausible definition might lead us astray. We can not say that equitable assets include all assets that can not be made available without the aid of a court of equity. Put this case, T holds a term of years upon trust for A; A dies having appointed M his executor; that term of years, that interest in the land is legal assets, though it is but an equitable interest in the land. It becomes vested in M, because he is executor of A, that is enough to decide that it is legal assets. On the other hand if A be legal tenant in fee simple and devises his realty to M, upon trust to pay debts, and appoints M his executor; then although M's estate in the land is a legal estate it is equitable assets, for M does not take this freehold estate *virtute officii*, he does not take it as executor, he takes it because it has been devised to him. See the judgment of Kindersley, V. C., in *Cook* v. *Gregson*, 3 Drew. 547.

"At the present day we seem to have two or perhaps three kinds of equitable assets, all other assets being legal. In the first place there is the oldest kind of equitable asset — it consists of freehold and copyhold estates which the testator has by his will either devised for the payment of his debts or charged with the payment of his debts. And here I may remark that in old days the Court was extremely anxious to find in a will a charge of debts upon the real estate and that to this day a charge of debts upon the real estate will be very easily found. For example, if a testator says 'In the first place I direct that all my debts be paid and then I give my real estate to A and my personal estate to B,' this is quite enough to charge the real estate with the payment of debts. The reason for this anxiety will be apparent to you if you will remember that until the year 1833 freehold and copyhold estates were not assets for the payment

of simple contract debts or even of specialty debts unless the heir was mentioned in the specialty — therefore unless a charge of debts could be found in his will a testator might die leaving large estates and yet his creditors would go unpaid. The rule of construction which easily finds a charge of debts was begotten by these circumstances, but it still holds good though since 1833 the dead man's freeholds and copyholds have been assets for the payment of all debts. Well, if there be a charge of debts on the realty, then the realty is equitable assets. Secondly we come to the Act of 1833 (3 and 4 Will. IV, c. 104) which made realty assets for the payment of all debts, made, as I understand it, all realty which was not devised for the payment of debts or subjected to a charge for the payment of debts, equitable assets, but subject to this rule that out of such realty a creditor with a specialty binding on heirs was to be preferred to creditors with specialties not binding on heirs and simple contract creditors. Then the Act of 1869 abolished this preference — and so, as I understand it, the result is reached that freeholds and copyholds are equitable assets whether or no they be charged by the testator with the payment of his debts (see *Walters* v. *Walters*, 18 Ch. D. 182). . . .

"Out of the legal assets the debts are to be paid in order of their rank, out of the equitable assets they are to be paid ratably without regard to their rank." — Maitland, Equity, pp. 199–201.

"In the United States, speaking generally, all a man's property, real and personal, is liable for all his debts. If any debts have precedence, it is without regard to the kind of assets out of which they are paid. The distinction between real and personal, and between legal and equitable assets, if it exists at all, is therefore of slight consequence in this country." — 4 Gray, Cas. on Prop. (2d. ed.), p. 558.

GOATE *v.* FRYER.

2 Cox. Ch. 201. 1789.

The plaintiff Dorothea Goate was the administratrix of her late husband, Alexander Goate, who died in December, 1788, intestate, indebted to several persons, and amongst others to Thomas Wood by simple contract. In Trinity Term last Thomas Wood filed his bill in this court on behalf of himself and all other the creditors of the said Alexander Goate who should come in and contribute to the expense of that suit, against the present plaintiff Dorothea Goate, for a general account of the intestate's personal estate possessed by her, and a distribution thereof ratably amongst his creditors. To this bill she put in an answer, and submitted to account. The cause was heard on the 30th June, when a decree was made for taking the account, advertising for creditors, and a distribution amongst those who should come in ratably and in proportion to their debts. In Easter Term last, before the filing of Wood's bill, the present defendant, James Fryer, brought an account at law against the plaintiff as administratrix of her husband for goods sold and delivered, to which she pleaded *plene administravit* on the 30th June, being the date of the decree, and immediately afterwards filed this bill, stating the former suit and decree made therein, and praying to be protected thereby, and an injunction to restrain the defendant Fryer from proceeding in his action at law. At a seal after last term the common order for an injunction was obtained for want of an answer.

In this term he put in his answer, admitting personal notice of the former decree, but insisting that he had a right to proceed at law, and he gave notice of trial in the action.

LORD CHANCELLOR [THURLOW]. It is now the settled rule of the court not to permit any creditor to proceed at law against an executor or administrator after a decree to account and for payment of all debts; for that gives every creditor who carries in a claim equal to that of a creditor by judgment at law from the date of the decree. The court does not take away from a creditor the benefit of such a judgment, if prior to the decree; but it only supports the decree as equal in point of rank to a judgment, and then follows the rule of law in giving preference to the prior debt in point of time. Therefore let the injunction extend to stay trial; but as the defendant's action at law was commenced before the first bill was filed, let the defendant be at liberty, if he shall discontinue his action at law, to prove the costs of the action as a debt under the decree.

MALTBY *v.* RUSSELL.

2 Sim. & St. 227. 1825.

THIS was a creditors' suit. The decree directed the Master to take the usual accounts.

The personal representatives had, subsequently to the filing of the bill, paid several of the testator's debts, one of which was due to a firm in which one of them was a partner. The Master having refused to allow them the sums they had paid in discharge of those debts, they took exceptions to his report.

The exceptions now came on to be argued.

THE VICE-CHANCELLOR on the argument, expressed a strong opinion in favor of the Master's report, and doubted the correctness of Colles's report of the case of *Lord Orford* v. *Darston*, Colles, P. C. 229. His Honor, however, took time to consider of the case, and afterwards delivered judgment to the following effect.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] That an executor should be permitted, after a bill filed for the administration of the assets here, to prefer one creditor to another, breaks in upon the ruling principle, that equality is equity. Even at law, an executor cannot, after an action brought, prefer one creditor to another, unless judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such judgment (which breaks in upon the principle of greater legal diligence), because it is said that he is not bound to charge his testator's estate with costs, by defending the action where he knows the debt to be due.

I find, however, that the case of *Darston* v. *Lord Orford*, in the

House of Lords, is correctly reported; and in *Waring* v. *Danvers*, 1 P. W. 295, it is expressly referred to as establishing the point that a creditor may give a preference after a suit instituted.

I am bound therefore by this authority to allow the exceptions in this case.[1]

WILSON *v.* PAUL.

8 Sim. 63. 1836.

THIS was a suit by creditors against the executors of the debtor, who died possessed of personal estate only.

Before the institution of the suit, the executors paid to some of the creditors, a dividend of 13*s.* 4*d.* in the pound on the amount of their debts.

After the usual decree had been made, the question was whether those creditors were entitled to be paid the balances remaining due to them, *pari passu* with the creditors whose debts were wholly unpaid.

THE VICE-CHANCELLOR held that the creditors who had been partly paid, were not entitled to any further payment, until all the other creditors had been paid proportionably with them.[2]

OLPHERTS *v.* CORYTON.

[1913] 1 Ir. Ch. 211. 1913.

THIS action was brought for the administration of the estates of Mrs. Elizabeth Olpherts, and of her husband Richard Olpherts, both of whom died in 1892.

An application was made on behalf of Messrs. Lionel Wynne, and Rev. Henry Haworth Coryton, as personal representatives of the original plaintiff, Francis Montgomery Olpherts, to vary the Chief Clerk's certificate by allowing them to retain (*inter alia*) two sums of £1,000 and £3,000 respectively, which they or their immediate testator had paid as surety for Richard Olpherts, whose estate was being administered in this action. Francis Montgomery Olpherts had claimed such right of retainer in his own lifetime. [The application included other matters with which the present report is not conversant.]

BARTON, J. [after disposing of other questions]: There remains the question of the executor's right to retain his simple contract debt as against specialty creditors. The executor is entitled to retain his debt in priority to other creditors of equal degree, as the Vice-Chancellor observed in *In re Simpson*, [1895] 1 I. R. 530, in reference to secured and unsecured creditors. But neither in that case nor in

[1] Compare *In re Samson*, [1906] 2 Ch. 584, 594.

[2] See *Deg* v. *Deg*, 2 P. Wms. 412; *Mitchelson* v. *Piper*, 8 Sim. 64.

any other case in Ireland have two funds been formed, one in respect of specialty debts, and the other in respect of simple contract debts, for the purpose of postponing an executor's simple contract debt to specialty debts. I have consulted the Chief Clerk to this Court and the Chief Clerk to the Court of the Master of the Rolls; and they tell me that in their long experience they have never formed, and have never been asked to form, two funds for that purpose. The English decisions which support the practice of forming two funds were impliedly condemned by the Court of Appeal in England, in *In re Samson*, [1906] 2 Ch. 584, 591, 592, as being erroneous and in direct conflict with the provisions of Hinde Palmer's Act.[1] In *In re Jennes*, 53 Sol. Journ. 376, Neville, J., was of the same opinion; but as *Re Samson supra*, was a case of preference, not of retainer, he felt bound to follow the previous English decisions, of which he disapproved, as they were not expressly overruled.

As no such practice has ever existed in Ireland, I am at liberty to apply to this case the *ratio decidendi* of the Court of Appeal, and the opinion of Neville, J. It seems to me that the executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as by Hinde Palmer's Act both classes of creditors are of equal degree.

The executor's right of retainer extends only to legal assets which have come actually or constructively to his hands. I am not asked upon the present application to decide whether any, and if so what, legal assets have come to his hands. That question will, I understand, be raised by another motion.[2]

FURNESS ET AL., ADMINISTRATORS *v.* THE UNION NATIONAL BANK OF CHICAGO.

147 Ill. 570. 1893.

MR. JUSTICE MAGRUDER delivered the opinion of the Court:[3]

On November 11, 1890, the defendant in error filed in the Probate Court of Cook County against the estate of James M. Gamble,

[1] "In the administration of the estate of every person who shall die on or after the first day of January one thousand eight hundred and seventy, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his death."—Stat. 32 & 33 Vict., c. 46 (1869).

[2] *In re Harris*, [1914] 2 Ch. 395, *accord*. The earlier decisions of *Wilson* v. *Coxwell*, 23 Ch. D. 764, and *In re Jones*, 31 Ch. D. 440, must be considered as overruled.

[3] Only the opinion is given.

deceased, proof of a claim held by it against said estate, consisting of two notes executed to it by said Gamble in his life-time, and secured by a certain collateral. The plaintiffs in error as administrators of the estate objected to the allowance of the claim. It came up for trial before the Probate Court on February 6, 1891, and was then heard and taken under advisement by that Court. It was held under advisement until November 2, 1891, on which day it was allowed for the amount hereinafter stated. It is conceded that the estate is insolvent, and unable to pay more than a small percentage upon the amount of its indebtedness. In August, 1891, the Bank, defendant in error, disposed of the collateral held by it as security, realizing therefrom an amount which was a little more than one third of the amount due to it, for principal and interest, upon its notes. The allowance made by the Probate Court was for the balance of the claim, as filed and proved upon the hearing, after deducting therefrom the net amount realized from the collateral. Upon appeal to the Circuit Court, the latter Court gave judgment for the full amount due upon the claim, but with a proviso that whatever the Bank should receive in dividends from the estate, added to the amount realized by it from its collateral, should not exceed the amount actually due to it upon its claim. The judgment of the Circuit Court has been affirmed by the Appellate Court, and such judgment of affirmance is brought here for review by writ of error.

The question presented is this: where a creditor, holding a claim secured by collaterals, against the insolvent estate of a deceased person, files and proves his claim for the full amount in the Probate Court, and has a trial of it before the Court upon its merits, and, after it has been so filed and proved and tried, realizes from his collaterals a sum which is less than the amount of his claim, is he entitled to a dividend upon the whole amount of his claim as proven, or only to a dividend upon the difference between such amount and the sum realized from his collateral security? In *In re Bates*, 118 Ill. 524, we decided that the assignee under an assignment for the benefit of creditors should pay the secured creditor a dividend upon the whole amount of his claim as proved and reported, and not a dividend merely upon the excess of the claim over the value of the security, or over the amount realized from the security after the filing and proving of the claim.

We see no reason why the same principle is not applicable in the distribution of *pro rata* dividends upon claims filed and proved in the Probate Court against the estates of deceased insolvents. *Mason* v. *Bogg*, 2 Mylne & Craig's Ch. Rep. 443; *Kellock's Case* and *Ex parte Alliance Bank*, L. R. 3 Ch. App. pages 769 and 771; *West* v. *Bank of Rutland*, 19 Vt. 403. A creditor, secured by collaterals, is permitted to prove his claim for the full amount, because he has the double right of suing the debtor personally on the debt itself, and

also of realizing from the property pledged as security. He may sue on the principal debt before resorting to the security. *Cushman* v. *Hayes*, 46 Ill. 145; *Archibald* v. *Argall*, 53 id. 307; *Wilhelm* v. *Schmidt*, 84 id. 183; *Darst* v. *Bates*, 95 id. 493. The right to sue on the debt, and the right to enforce the security, are concurrent rights, and proceedings to enforce both of them may be pursued until the debt is paid in full. These rights remain the same if "the debtor dies and dies insolvent." *Mason* v. *Bogg*, *supra*; *Ex parte Alliance Bank*, *supra*. The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course, this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it. If he has realized upon his collateral before filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him, that is to say, for what remains of his claim after deducting the amount realized from the collateral. The collateral security does not become a part of the assets of the estate until the creditor's lien upon it is discharged, and cannot be made to benefit the other creditors until the claim of the creditor having the lien upon it is paid in full. But the amount of the dividend upon the full amount proven, when added to the amount realized from the collateral, must not exceed the amount of the debt proven.

In the absence of express agreement to that effect, the pledgee is not obliged to sell the property pledged at a specified time, even when requested to do so by the pledgor. *Badlam* v. *Tucker*, 1 Pick. 400; *Robinson* v. *Hurley*, 11 Iowa, 410; *M. & N. Elevator Co.* v. *Betcher*, 42 Minn. 210. But if a creditor, who has filed and proved his claim for the full amount in the probate court, can only be allowed the difference between such amount and the sum thereafter realized by disposing of his collaterals, there will be a temptation to prolong the litigation and delay the allowance in order that he may be forced to dispose of his collaterals, so that the dividends coming to him may be calculated upon a reduced claim. By such a course of proceeding the secured creditor may be deprived of his right, under the law, to proceed both against the estate and the security, until he gets payment in full. *Patten's Appeal*, 45 Penn. St. 151; *Miller's Estate*, 82 id. 113; *Citizens' Bank of Paris* v. *Patterson*, 78 Ky. 291; *Brown* v. *Merchants' Bank*, 79 N. C. 244.

It makes no difference in the application of the rule, permitting an allowance of the full claim and dividends upon the full claim as so allowed, whether the allowance by the court is a judgment or not, or whether it draws interest or not. In case of insolvency, the claims to be paid *pro rata* are the claims allowed. Rev. Stat. c. 3, Sec. 71. If dividends may be paid upon the claims after they are

allowed, application of the proceeds realized from the sale of collaterals can be made upon them after their allowance.

In its account, the Bank makes certain deductions from the proceeds of the sale of the collateral security for expenses incurred by it in protecting and disposing of the security. We find nothing unreasonable in any of these deductions. Whatever reasonable expense is necessarily incurred by the pledgee in keeping and caring for the property pledged, and protecting it against liens and taxes and assessments, and asserting title to it, or rendering it available, is a fair charge against the property. *Hills* v. *Smith*, 28 N. H. 369; *Starrett* v. *Barber*, 20 Me. 457; *McCalla* v. *Clark*, 55 Ga. 53; *Raley* v. *Ross*, 59 id. 862; Jones on Pledges, Sec. 400.

Whatever defect there may have been in the execution of the agreement, authorized by the Probate Court to be made between the Bank and the administrators of the estate, is cured by the stipulation, entered into and signed by both parties, as to the agreed state of facts upon which the case was tried in the court below. The stipulation admits the execution of the agreement by both parties in the following words: "for the purposes of the hearing of this case, * * * the following facts are stipulated between the parties hereto: * * * that on the 15th day of January, 1890, * * * the said administrators and the said Union National Bank executed a certain agreement, a copy of which is hereto attached as Exhibit B."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.[1]

RAMSAY ET AL. *v.* RAMSAY, ADMINISTRATOR.

196 Ill. 179. 1902.

Rufus N. Ramsay died in 1894, residing in Illinois. E. P. Ramsay was appointed immediately administrator in Illinois. Claims allowed amounted to $183,854.70. Decedent owned real and personal property in Illinois and real estate in Missouri. In 1895 an administrator was appointed in Missouri. Claims of the appellants, Mrs. Ramsay, the widow, for $18,931.72 and G. Van Hoorebeke for $2020.42, were allowed in Missouri; and through a sale of real estate there by order of the probate court of St. Louis they received 12.44 per cent of their claims. At the time that order of distribution was entered, appellee, the resident administrator, appeared in the St. Louis probate court and asked that the money in the hands of the Missouri administrator be sent to him for distribution in Illinois;

[1] *Mason* v. *Bogg*, 2 Myl. & Cr. 443, *accord*. See *West* v. *Bank of Rutland*, 19 Vt. 403. *Jamison* v. *Adler-Goldman Co.*, 59 Ark. 548; *Erle* v. *Lane*, 22 Colo. 273; *Laplante* v. *Convery*, 98 Ind. 499; *Haverhill Ass'n* v. *Cronin*, 4 Allen 141; *Wheat* v. *Dingle*, 32 S. C. 473; *Van Winkle* v. *Blackford*, 54 W. Va. 621, *contra*. For statutes, see 2 Woerner, Am. Law of Adm. (2d ed.), § 408. For the rule in bankruptcy, see *Merrill* v. *National Bank*, 173, U. S. 131; *Sexton* v. *Dreyfus*, 219 U. S. 339.

but this request was denied. In 1900 he presented a partial settlement to the probate court in Illinois charging himself with the two items paid appellants in Missouri and taking credit for the same as having been paid on their claims. This report showed that the assets of the estate amounted to $131,810.42, and that the total liabilities of the estate to seventh-class claimants, including the appellants, amounted to $183,854.70. On this report he asked for an order of distribution. Appellants appeared and filed objection. The Circuit Court of Clinton County directed the appellee to pay all claimants, except appellants, 12.44 per cent on their claims, being the amount which they had already received, thus making all other claimants equal with them; and then to distribute the balance ratably among all claimants. Upon writ of error from the Appellate Court for the Fourth District the judgment of the Circuit Court was affirmed. From that judgment of affirmance this appeal was prosecuted.[1]

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court.

It is insisted by appellants that they are entitled to receive full distributive shares of the assets reported by the administrator to the probate court of Clinton county without in any way being charged with the amounts received from the Missouri assets. The proposition is so manifestly unjust to other creditors of the insolvent estate that it should be sustained only in obedience to strict and imperative requirements of the law. The general policy of the law in all jurisdictions, so far as we are aware, is, that all the property of a deceased insolvent debtor not set apart for the widow or minor children shall become assets in the hands of his administrator for the payment, *pro rata*, of all his debts according to classification, no matter where the assets may be found or the creditors reside. In *Dawes* v. *Head*, 3 Pick. 128, it was said by Parker, Judge: "We cannot think that in any civilized country advantage ought to be taken of the accidental circumstances of property being found within its territory which may be reduced to possession by the aid of its courts and law, to sequester the whole for the use of its own subjects or citizens, and where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government." The above quoted sections 263 and 264 of the Missouri statute,[2] as well as other sections of that statute, clearly recognize this just and equitable rule. Our statute provides, that "when the estate

[1] This statement of facts is substituted for that in the report.

[2] Missouri, Rev. Laws (1889), Sec. 263. If a person dies insolvent, his estate found in this State shall, as far as practicable, be so disposed of that all his creditors, here and elsewhere, may receive an equal share in proportion to their respective debts. Sec. 264. To this end the estate shall not be transmitted to the foreign administrator until his creditors who are citizens of this State shall have received their just proportion that would be due them if the whole estate, wherever found, were divided among all of said creditors in proportion to their respective debts, without preferring any species of debt to another.

is insufficient to pay the whole of the demands, the demands in any one class shall be paid *pro rata*, whether the same are due by judgment, writing obligatory or otherwise, except as otherwise provided." 1 Starr & Cur. c. 3, Sec. 71. Unless, therefore, appellants have shown that their claims are in some way exceptions to the general rule, the judgment of the circuit court is right and should be affirmed.

It seems to be thought by appellants' counsel that they are entitled to a preference over other creditors, as to the Missouri assets, on the principle that in the settlement of insolvent estates a creditor shall be allowed to prove his whole debt without regard to any collateral security he may hold, and be entitled to a dividend on the whole claim so allowed, — citing *Furness* v. *Union Nat. Bank*, 147 Ill. 570, *First Nat. Bank of Peoria* v. *Commercial Nat. Bank*, 151 id. 308, *Levy* v. *Chicago Nat. Bank*, 158 id. 88, and cases from other jurisdictions holding the same rule. No argument seems necessary to show that the doctrine of these cases can have no application to the question at issue. How can it be said that the Missouri property was in any sense a collateral security for appellants' claims, or that it was a fund open to them for the payment of their debts rather than those of all other creditors? At the time of the death of Ramsay he owned the property free from any lien whatever in their favor, and it was liable for the payment of all his debts.

It is further contended that appellants are entitled to a preference over other creditors in that property because of some superior diligence on their part. No reason or authority is cited in support of this contention, and none, we think, can be. It was undoubtedly the right of all the creditors of Rufus N. Ramsay to have the Missouri estate, as well as his Illinois property, converted into money and applied in payment of his debts, and it was the duty of the resident administrator to see that that purpose was accomplished. Being a non-resident of the State of Missouri, and therefore disqualified by the statute of that State from taking letters of administration himself, it was his duty to procure administration in the name of a resident. It was undoubtedly also the privilege of any creditor to cause such administration. It was also proper for Illinois creditors to file their claims and have them allowed in the probate court of St. Louis and to cause the real estate there to be sold for the payment of the debts of Rufus N. Ramsay, but not for the payment of the claims probated there, alone, because by the express provisions of the statute of that State, the estate being insolvent, the property found in Missouri was to be so disposed of that all his creditors there and elsewhere should receive an equal share, in proportion to their respective debts. There was no occasion for diligence upon the part of creditors in filing their claims there. They each had a right to rely upon the Missouri statute for protection against the claim now made by appellants.

Upon the death of a person intestate, leaving assets in different States or countries, the administration in the domicile of the deceased is the principal administration through which, in contemplation of law, assets are to be distributed in payment of his debts. *Young* v. *Wittenmyre*, 123 Ill. 303. Administration in other States or jurisdictions must be held in order to collect the debts and reduce the assets into money, which are known as ancillary or auxiliary administrations. In the absence of statutory provision it is the duty of the auxiliary administrators to collect the assets, reduce them to money and transmit them to the principal administrator, or they may, under certain circumstances, pay claims probated there, transmitting only what remains in their hands to the principal administrator. Where, however, the estate is insolvent, it has been held, and we think with reason and justice, that the auxiliary administrator has no right to pay resident claimants, or those who have filed their claims there, more than their *pro rata* share of the whole estate. *Dawes* v. *Head*, *supra*; *Davis* v. *Easty*, 8 Pick. 475; *Minor* v. *Austin*, 45 Iowa, 221; 2 Kent's Com. 434. Manifestly, under section 263 of the Missouri statute, the administrator there had no right to pay these appellants more than their proportionate part of the whole assets, taking into account all seventh-class "creditors there and elsewhere," even though the property in that State had sold for enough to pay them in full, and, as we have said, every "creditor there or elsewhere" had a right to rely upon his performing his duty under that statute. He might have complied with the request of appellee, and after paying the small claims of resident creditors transmitted the balance of the fund in his hands for distribution. However, his refusal to do so, and the refusal of the St. Louis probate court to order him to do so, did not render it impracticable to still give effect to said section 263 and the provisions of our own statute, above quoted.

It is to be observed that these appellants are not content with what the Missouri court gave them, but come into the probate court of Clinton county and demand that they shall be allowed to participate in the assets in the hands of the appellee, the resident administrator. Having done so, we entertain no doubt that the latter court had the power, and that it was its duty, to require them to account for that which they had received under the Missouri administration, and to order a distribution *pro rata* among all the seventh-class creditors.

The judgment of the circuit court to that effect was right, and was properly affirmed by the Appellate Court.

Judgment affirmed.[1]

[1] On the right of a foreign creditor to prove his claim with an ancillary administrator, and on the law governing the proportions to be received by domestic and foreign creditors, see 3 Beale, Cas. on Conflict of Laws, pp. 152–174.

SECTION IV.

LIABILITY OF REAL ESTATE FOR PAYMENT OF DEBTS AND LEGACIES.

WISKER ET AL., APPELLANTS *v.* RISCHE.

167 Mo. 523. 1901.

MARSHALL, J.[1] . . . The position of the plaintiffs is that the sixth clause of the will simply conferred a power to sell and apply the proceeds, upon Mr. Davis, limited by the advice and consent of Henry C. Lay and Henrietta Dausman, and that upon the death of Henry C. Lay, this power ceased, and therefore the sale by Davis to defendant's grantor is void, and the power having ceased the residue of the estate of Charlotte Lay descended to her heirs, and that if there was no money or personalty with which to pay the debts of the estate, the necessary funds could only be raised by having the probate court order a sale of the real property.

In England, and in some of the American cases, the courts literally and strictly construed powers to sell real estate, and it was generally held that the power must be executed exactly in the manner and by the exact persons upon whom it was conferred, and that the slightest failure to comply with the letter of the power vitiated the grant. Thus, if the power to sell was given to three persons (e. g., executors, etc.), *nominatim*, and one died, the power ceased, but if the power was given to three of a class (e. g., executors), and one died, the two remaining could act because they filled the plural number constituting the designated class; but if two of the class died, the survivor could not act and the power ceased. 1 Sugden on Powers, p. 204, et seq.; 4 Kent's Com. (14 Ed.), *p. 333; 1 Perry on Trusts, (5 Ed.), sec. 294; *Hamilton* v. *N. Y. Stock Exch. Bldg. Co.*, 20 Hun. 88; *Powles* v. *Jordan*, 62 Md. 499; *Kissam* v. *Dierkes*, 49 N. Y. 602.

Washburn on Real Prop. (5 Ed.), vol. 2, p. 716, thus states the rule: "In the case of executors, moreover, this nice distinction is recognized and prevails, that if the devise is to them to sell the estate, or for it to be sold, they take a trust of the estate with a power to sell. Whereas, if the devise is that the executors shall sell, it is a naked power, and must be executed by all; while in the other case it is not a naked power, and may be executed by such of the executors as execute the will. If a power is given by will to a trustee, and he neglects to exercise it, the execution of it devolves upon the court; but if the trustee dies before the time prescribed for the execution of the trust, the trust fails, and the testator is to be considered as dying,

[1] Part of the opinion is omitted.

thus far, intestate. If the authority to sell be given as a trust to the same person named as executor, his resigning his trust as executor does not impair his power to sell. And if the power be accompanied by a personal confidence and trust in the donee or donees, he or they alone can execute it; nor can it pass to others; it must be executed by the persons named, unless an authority to substitute another be expressly given."

Two reasons are ordinarily given for such construction, first, that the power of sale is, *per se*, a personal trust or confidence reposed in the donee of the power by the donor thereof, which can not be said of any substituted donee or if the power is vested in more than one, which can not be executed by a less number; and second, as was so ably pointed out by Scott, J., in *Norcum* v. *Ringling*, 17 Mo. l. c. 116, because "the law of primogeniture prevails in England, and has always been favored as the principal means of sustaining one of the estates of the government. Hence, powers to executors to sell, as the object of such provisions was to turn the inheritance out of the course of descent prescribed by law, are construed strictly, and the courts laid hold of any pretext to defeat such dispositions, in order that the heir might not be disinherited." Then that learned judge further remarked: "In contemplating the refinements with which the courts of England indulged themselves in the construction of such powers, we are struck with the subtlety of the human mind. Some of these refinements would seem justly obnoxious to the criticism of being too curious and overstrained; such as consisted rather in formal arrangement of words, than of anything substantial. Under our system of government, the motive to these refinements never existed. Hence, as early as the year 1807, an enactment was made which is in force this day [being sec. 45, R. S. 1899] directing that the sale and conveyance of lands and tenements, to be sold in pursuance of a will, shall be made by the executors, or such of them as shall undertake the execution of it, or by the surviving executor, or by the administrator with the will annexed, if no other person be appointed in such will for that purpose, or if the person so appointed shall refuse to perform the trust, or *die before he shall have completed it* [the italics are superadded to point the application of the rule to the case at bar]. The comprehensiveness of this provision clearly manifests the indifference with which the General Assembly regarded the refinements with which this subject had been overlaid by the English courts."

In *Littleton* v. *Addington*, 59 Mo. 275, Wagner, J., said if the power was conferred upon the executor and not upon the person named as executor, *nominatim*, the power was not a personal trust but belonged to the office, and survived the death or resignation of the person named as executor. In that case the power was not executed during the continuance of the office of executor, and, hence, the conveyance was held void. The distinction pointed out by Wash-

burn, in the excerpt above quoted, was not called to the attention of the court, and, hence, was not noted, that there are cases where the grant of power creates a trust, independent of the office of executor, which is unaffected by the termination of the executorship.

In addition to what has been so lucidly shown by Scott, J., in respect to the abolition by our statute of the fine distinctions and subtleties of the English cases, the statutes of the State have also abrogated the like distinctions and subtleties of the English courts in regard to the construction of wills, and now our courts are required to have "due regard to the directions of the will, and the true intent and meaning of the testator" R. S. 1899, sec. 4650, instead of applying such a construction as to require a testator to express his purpose in recognized legal phraseology, as was formerly the case.

In the case at bar, the intention of the testatrix is perfectly clear. She intended, first, to carve out homes for her children and grandchildren, and second, to set apart certain of her real property (she had no personalty) for sale for the payment of her debts, and if any surplus remained to have it divided among her children and grandchildren.

The sixth clause of the will, above set out, *expressly charged such property with the payment of her debts*, and directed her executor to sell it and apply the proceeds primarily to the payment of her debts.

The modern rule is that: "A testator may, by his will, confer upon his executor the power to sell his real estate for the payment of debts or for any other purpose to which the testator wishes his real estate to be applied. Such a power may either be given by the will in express terms or it may be implied from the duties imposed by the will on the executor; and the necessity or propriety of a sale may be committed to the judgment of the executor, or the power may be peremptory; but the object of the power must be specified in or clearly ascertainable from the will. When the will gives the power to the executor to sell land in case of a deficiency of assets, he must sell under the power and not under the statute authorizing sales by leave of the probate court." 11 Am. and Eng. Ency. Law (2 Ed.), p. 1040.

In such case an order or license of the probate court is not necessary, for the power to sell already exists, but after sale, the proceeds must be administered under the order and direction of the probate court. *Ludlow* v. *Flournoy*, 34 Ark. 451; *Norris* v. *Harris*, 15 Cal. l. c. 236; *Payne* v. *Payne*, 18 Cal. 291; *Matter of Delaney*, 49 Cal. 76; *Matter of Durham*, 49 Cal. 490; *Tracy* v. *Murray*, 49 Mich. 35; *Northrop* v. *Marquam*, 16 Oregon 173; *Rogers* v. *Jones*, 13 Tex. Civ. App. 453; *Matter of Davids*, 5 Dem. (N. Y.) 14; *Matter of Rosenfield*, 5 Dem. (N. Y.) 251; *Going* v. *Emery*, 16 Pick. 107; 26 Am. Dec. 645.

The power conferred by this will was not a mere naked power, but was an active trust, for there was something more for the executor to do than to simply sell — he had to apply the proceeds — hence, the will created a trust coupled and charged with a duty.

The will required the consent of the son and daughter of the testatrix to the sale. But this was clearly a subordinate requirement and idea to the principal purpose and intention of the will to provide homes for her children, and to pay her debts out of the residue of her property. The primary object and intention of the testatrix should not be allowed to fail because her secondary and subordinate intention had become impossible of fulfillment on account of the death of the son, whose consent to the sale was prescribed. To hold that the son's death, before the sale, had the effect to vitiate and annul the power, would not only *pro tanto* have the effect of holding that the testator died testate but became intestate thereafter by the subsequent death of her son, so far as the residue of her estate is concerned, but would also defeat the dominant scheme and controlling policy of the whole will. Such a narrow and destructive construction of the will and the power conferred upon the executor, would be contrary to the spirit of our statute, which abolished the fine distinctions and subtleties of the common law. Sec. 45, R. S. 1899. For, if power given to more than one executor survives to and may be executed by those who remain, after the death of the donees, as this statute provides shall be the case, no good reason can be given why the power of consent given by this will to the son and daughter, should not survive to the daughter, after the death of the son.

In this case the provisions of the will were faithfully observed in all respects, except that the dead son's consent to the sale was not and could not be had. The proceeds of the sale were administered under the direction of the probate court and applied to the payment of the debts of the estate. The alternative of holding that the secondary or the primary intention, design, scheme, plan and policy of the will shall prevail, is here presented, and no difficulty is perceived in reaching the conclusion that the primary object and the dominant purpose and intention shall prevail. This conclusion is in harmony with the principles announced by this court in *Lackland* v. *Walker*, 151 Mo. l. c. 257, where it was said: "Generally, it has been laid down that in such cases it is the primary duty of the court to ascertain the dominant purpose of the donor, and to so administer the trust, and, if necessary, to so modify the details prescribed, in the light of emergencies which may be developed from time to time, as to preserve and effectuate the controlling intent *Barkley* v. *Donnelly*, 112 Mo. 561." Or, as was said further: "It seems to be settled law that in a proper case, a court of equity can, in order to preserve the life of the trust, amputate its dead member" *In re Petition of Philadelphia*, 2 Brewst. 462.

The judgment of the circuit court is right and should be affirmed.

All concur, except Valliant, J., absent.[1]

ANONYMOUS.

Freem. 278. 1704.

LAND was devised to the heir at law, paying a sum of money to B. It was held in this case, that paying did not make a condition, because no one could enter for the condition broken but the devisee himself; but this would be a trust upon the land for raising the money, and if a purchaser had notice of the will, he should be affected with it; *Adair* v. *Shaw*, 1 Sch. and Lef. 262; but as this case is, if the heir should sell to a purchaser without notice of the will, (as he might make a title without the will, being heir at law) *Lady Schaftesbury* v. *Arrowsmith*, 4 Ves. Jr. 66, 70, the money might be lost; and therefore the money being not payable until some years hence, the heir was decreed to give security, by mortgaging the estate. And in this case it was said, that where there is an agreement between parties upon a security, that this court will never cause the party to give further security; but where there is a trust for raising money, and the estate is like to be wasted, this court will inforce the giving of security, so that the trust may not be defeated: and the Lord Keeper said he had known the spiritual court refuse administration to the next of kin, where it appeared to them that he was a spendthrift, and like to waste the estate: and in this case it was said, that in case the devise were to a stranger paying £100 to A. that this makes a condition, and that the heir may enter for the breach of it; but when he hath entered, he shall be a trustee, so far as to secure the £100.

CONKLING, APPELLANT *v.* WEATHERWAX ET AL., RESPONDENTS, AND TOMPKINS, APPELLANT, IMPLEADED WITH OTHERS

173 N. Y. 43. 1903.

PARKER, Ch. J.[2] This controversy is over the priority of liens on certain real estate and is waged between the legatees of a testator

[1] See *Ferris* v. *Ferris*, 98 Atl. (Del.) 215; *Stoughton* v. *Liscomb*, 98 Atl. (R. I.) 183.

As to whether an executor who has power to sell under the will must obtain leave of court, see *Wilson* v. *Holt*, 83 Ala. 528; *Ludlow* v. *Flournoy*, 34 Ark. 451; *Bennalack*, v. *Richards*, 116 Cal. 405; *Bailey* v. *Rinker*, 146 Ind. 129; *Iowa Loan & Trust Co.* v. *Holderbaum*, 86 Iowa 1; *Brooks* v. *Bergner*, 83 Md. 352; *Rollins* v. *Rice*, 59 N. H. 493; *Matter of Bolton*, 146 N. Y. 257; *Northrop* v. *Marquam*, 16 Oreg. 173; *Appeal of Penn. Co.*, 168 Pa. 431.

[2] The statement of facts is omitted.

on the one side and the mortgagee of his residuary devisee on the other. The courts below have held that the legacies are still liens and must be paid out of the proceeds of the sale of the real estate upon which they were charged by the testator, but not until after the payment of the amount secured by a mortgage given thereon by testator's devisee, his son, to whom the testator gave an interest in the farm after giving the legacies to his two daughters, directing the legacies to be paid out of the farm, the devise to the son being in the following words: "I also give and bequeath to my son Charles, all my real estate and personal property *after* the payment of my just debts and funeral expenses together with the expense of settling my estate, and the payment of above-named legacies." In other words, the judgment gives to the mortgagee of a devisee of the remainder after payment of legacies and other charges priority of payment over such legacies.

Our examination of the situation leads us to a different conclusion. Testator by his last will and testament gave to plaintiff and her sister legacies payable "out of my said farm by my executor." The will in terms, therefore, declares a lien upon the farm, which by a later provision of the will passes to his son Charles *after* payment of such legacies and other charges. This lien was created and recorded long before the mortgage came into existence, and the first inquiry is: Were the legacies still liens when, on May 1, 1884, Charles gave a mortgage on his interest in the farm to defendant Hidley? They necessarily were unless (1) they had been paid, or (2) had become barred by some Statute of Limitations, or (3) the liens had been released by the legatees. It is found as a fact by the trial court that they had not been paid. There is neither finding nor evidence that the liens had been released. The Statute of Limitations had not as yet even started to run, because the will provided that the farm should not be sold during the life of the testator's widow without her consent, and also because there had not been a judicial settlement of the executor's accounts. Code Civ. Proc., sec. 1819.

It is clear, therefore, that the legacies were liens at the time when Charles gave to defendant Hidley a mortgage upon his interest in the property. And it was inferentially so found by the courts below, which held that the legacies are still a lien upon the farm, and entitled to payment next after the payment of the Hidley mortgage. The plaintiff's legacy and that of her sister, therefore, had been liens upon the farm by the express terms of the will for something like sixteen years before the giving of the Hidley mortgage, and it necessarily follows that such mortgage was at the time of its making a subsequent lien to those of the legatees which were created by the testator, for the mortgage lien was created by his devisee, whose rights in the property were by the testator subordinated to the liens of the legatees.

How, then, has it happened that these liens of the legatees have

lost their priority? The legacies are still liens, for the Statute of Limitations has not run against them, and their priority cannot be taken away by a court of equity unless the legatees' conduct has been such that good conscience now requires that their priorities shall be surrendered to this mortgagee. There must at least be on the part of the legatees a failure to perform some duty which they owed defendant mortgagee by which the mortgagee lost some advantage which, but for the wrongful or neglectful act of the legatees, she would have had.

It is suggested that when Charles accepted the devise to him, as he did when he executed the mortgage to the defendant Hidley, he became personally liable to pay the legacies, and the legatees could have proceeded against him, and should have done so for the benefit of the mortgagee, inasmuch as failure to do so would operate to release some part of the security for the payment of their legacies.

It is not the rule, however, that a prior incumbrancer is bound at his peril to search for subsequent liens when about to release a part of his security, for, in order to impose upon him the obligation to regard this equity, his conscience must be affected by knowledge of the facts upon which the equity depends, or by notice sufficient to put him upon inquiry. *Sherman* v. *Foster*, 158 N. Y. 587, 596; *Howard Ins. Co.* v. *Halsey*, 8 N. Y. 271, 273. It was not sufficient for the defendant Hidley, therefore, to show that the legatees had lost remedies against Charles or against the estate in order to discharge the legatees' liens upon the farm to the extent of her mortgage, the liens being created by the will of the testator which was the same instrument under which Charles acquired his interest in the property. She had to go further and prove that the legatees had actual notice of her mortgage; that she requested them to proceed against Charles and that she had suffered actual damage which could have been avoided by timely proceedings against him.

Nothing of the kind is to be found in the findings, nor was any evidence offered tending to establish any one of the three facts necessary to entitle the mortgagee to secure the aid of equity in giving her lien priority to that of the legatees, for actual and definite damage to her as the result of deliberate neglect by the legatees can alone justify equity in transposing the order of the liens against the legatees' protest.

The rule is otherwise where a legatee appeals to a court of equity to impress a lien upon the real estate of a testator in his favor, for then before equity will interfere it must appear that others will not suffer because of his delay in pursuing the personalty of a testator in those cases in which the personal estate is primarily liable, but in this case the aid of equity is not invoked by the legatees to impress a lien — that matter was attended to by the testator, who created a lien in advance of vesting the title in the devisee whose rights therein only were mortgaged to defendant Hidley.

The mortgagee had notice of the fact of the liens, for the will was recorded long before she acquired her mortgage. If she wished the legatees to press for collection such other securities as they had, in order to relieve to some extent the burden of their liens upon the mortgaged property, she should have informed them of her lien and made request for action on their part looking in that direction. She not only did nothing of the kind, but has failed to prove that the legatees would have secured a dollar had they resorted to all the remedies that the law gave them, and, hence, it does not appear that defendant mortgagee was ever damaged by the non-action of the legatees. There is no precedent in this state for the destruction of a lien created by operation of law or by a testator for the benefit of a subsequent lien under such circumstances, nor will established equitable principles admit of one.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, BARTLETT and HAIGHT, JJ., concur; CULLEN and WERNER, JJ., absent.

Judgment reversed, etc.[1]

JOHN A. LILLY ET AL. *v.* C. W. WOOLEY, ADMINISTRATOR, ET ALS.

94 N. C. 412. 1886.

CIVIL ACTION, in the nature of a creditor's bill, tried before MACRAE, JUDGE, at Spring Term, 1884, of the Superior Court of Montgomery county.

This is an action, in the nature of a creditor's bill under the former practice, was commenced on August 11, 1877, and is prosecuted to subject the personal estate of the intestate, William P. McRae, in the hands of the defendant C. W. Wooley, his administrator, if sufficient can be found, and if not, the lands descended to the heirs-at-law, who are also defendants, to the extent of an ascertained deficiency, to the payment of his debts. The complaint alleges that payments had been made by the administrator out of the personal estate, to the distributees, which ought to have been applied to the liabilities of the intestate, that ought by these, to be now accounted for to the creditors. Upon the coming in of the answers, an order of reference was entered, without prejudice, to the Clerk, with directions to state the administration of the defendant Wooley, and to ascertain and report the payments made by him, on the distributive shares of the defendants. The report was accordingly made, and at Spring Term, 1883, John A. Lilly, the creditor who began and

[1] *Wilson* v. *Piper*, 77 Ind. 437; *Perkins* v. *Emory*, 55 Md. 27; *Blauvelt* v. *Van Winkle*, 29 N. J. Eq. 111; *Lovejoy* v. *Raymond*, 58 Vt. 509, *accord*. And see *Thomas* v. *Williams*, 80 Kan. 632; 30 L. R. A. 818 note.

prosecutes the action, filed a single exception, which was sustained, and the indebtedness shown in the transcript from Montgomery Superior Court, declared to be subsisting and in force against the intestate's estate. At Spring Term of the following year, the administrator filed exceptions also, and it was agreed that the issues arising upon the pleadings, should be passed on by the presiding Judge, instead of a jury. Thereupon the Court found the facts, and made rulings of law thereon as follows:

"I. That on the 11th of August, 1877, the defendant C. W. Wooley, and all the sureties upon his bond, as administrator of the estate of W. P. McRae, deceased, were insolvent, except Wilborn Lassiter, and that said Lassiter had converted his property into money, and removed to the State of Florida, but frequently returned to North Carolina on visits; that he was not insolvent, though a debt could not be collected out of him by the ordinary process of execution, but that he always had money.

"And upon the foregoing facts found, it is considered that the said Lassiter being solvent and freqently in this State, said bond was not insolvent. Plaintiff excepts.

"II. That this action is not barred by the statute of limitations:

"1. As to the administrator, because he had not paid over all the assets to the distributees, the referee having found a balance still in his hands. Due advertisement was made by the administrator for claims against said estate.

"2. As to the distributees, because they cannot set up the statute, unless the administrator can do so.

"Defendants except.

"It is admitted that the guardian has not obtained judgment against the administrator, as alleged.

"And it is therefore considered and adjudged that the plaintiffs have judgment against defendant C. W. Wooley, for the amount of their claims as reported by the referee, and that the other defendants go without day."

From which judgment the plaintiffs appeal to the Supreme Court.

SMITH, C. J. (after stating the facts.) It is a well understood rule in the administration of the estate of a deceased debtor, that his personal property must be first applied and exhausted, and the residue only of unpaid liabilities, can be satisfied out of his real property. If the representative into whose hands the personal effects come, make a distribution among the legatees or next of kin, he is personally answerable therefor to the creditors. *Bland* v. *Hartsoe*, 65 N. C., 204.

If the assets are wasted or misapplied, and the representative removed for misconduct, his successor, administering *de bonis non*, must sue on the administration bond and collect the amount of the *devastavit*, if the sureties are solvent, before he can proceed against the devised or descended lands. *Latham* v. *Bell*, 69 N. C., 135. And

his application for license to sell the decedent's lands will be refused, if the money so misapplied can be replaced by an action against the former representative, and his official sureties. *Carleton* v. *Byers*, 70 N. C., 691.[1]

When there is no personal estate, or it is insufficient to pay the debts of the decedent, or when consisting in slaves, it is lost by the *vis major* of war, without default of the representative or of the legatee or next of kin, to whom they have been delivered, the land becomes chargeable with the debts, and may be sold for their payment. *Hinton* v. *Whitehurst*, 71 N. C. 66. And payment may be enforced against any tract for the satisfaction of the indebtedness, leaving those, whose property may be taken, to obtain contribution according to the respective values of the other lands held by devisees or heirs.

In the present case, the obligors executing the administration bond, except one, are insolvent, and he, though possessed of property in another State, has none in this, and has become, since he executed the bond, a resident in Florida, and not accessible to process issuing from a home court. The Court ruled that this fact was a bar to any remedy against the debtor's real estate, until the remedy against the solvent surety has been exhausted. No decided case or authority has been adduced to sustain the ruling, and the proposition does not command our approval. We do not understand the law to be, under the adjudications of the Courts, that the creditor here residing, must pursue his remedy upon the administration bond, against a surety to it in a distant State, and exhaust this source, before he can resort to the debtor's real estate, found in this State. The rule which puts the personal in front of the real estate, in payment of debts, has reference to cases where both are within the jurisdiction of the Courts, and can be reached by process, and not to cases where only the latter can be thus subjected. The policy of the law, looks to the payment of debts due to home creditors, out of such property, whether real or personal, of the non-resident debtor, within the limits of the State, as is under jurisdictional control, and capable of being thus marshalled. It would be unreasonable, when the means of enforced payment, out of the debtor's lands, are here furnished, to force resident or other creditors, to follow the person and property of a surety, liable, not in person for the debt, but a guarantor of the fidelity of a principal, who has wasted or misapplied trust funds in his hands. The requirement that the personal property of the deceased must be first applied, or redress sought upon the bond given for its proper administration, and representing it, cannot, upon any just principle, be extended to a case where these resources are not accessible to the process of the Court.

The difficulties arising from permanent absence of both person

[1] And see *Speers* v. *Banks*, 114 Ala. 323; *Anderson* v. *Northrup*, 30 Fla. 612; *Wyse* v. *Smith*, 4 Gill & J. 295; *Paine* v. *Pendleton*, 32 Miss. 320; *Tilton* v. *Tilton*, 41 N. H. 479; *Kingsland* v. *Murray*, 133 N. Y. 170; *Latham* v. *Bell*, 69 N. C. 135.

and property, (for we do not attach importance to the fact that he frequently visits the State), are scarcely less formidable in the way of coercing payment, than insolvency itself. When the Courts of the State can give its creditors redress upon property here, it will not drive them to seek it in a foreign tribunal. This is the policy which underlies our attachment laws.

It was error, therefore, to refuse judgment against the heirs-at-law, subjecting the land fund to the payment of what could not be made out of the personal estate, and the ruling in this regard must be reversed. As the cause can be proceeded with to greater advantage and convenience in the Court below, it is remanded. Let this be certified.

Error. *Reversed and Remanded.*[1]

BRAY AND WIFE, APPELLANTS *v.* NEILL'S EXECUTRIX, RESPONDENT.

21 N. J. Eq. 343. 1870.

THIS was an appeal from the order of the Orphans Court of the county of Camden, made July 27th, 1868, directing part of the real estate of William Neill to be sold for the payment of his debts, and from an order made by the same court, October 12th, 1868, discharging a rule to show cause why the order to sell lands should not be set aside, granted on application of the appellant, October 9th, 1868.

THE ORDINARY.[2] William Neill, father of the appellant Catharine Bray, died in Philadelphia where he resided, March 27th, 1854. He left a will, of which he made his wife, the respondent, sole executrix. This will was proved and admitted to probate in Philadelphia, April 4th, 1854, and in the county of Camden in this state, August 5th, 1854. An inventory of the personal estate was duly exhibited in the office of the Register of Wills, in Philadelphia, May 8th, 1854; and the final account of the personal estate rendered by the executrix, under oath, December 30th, 1854, before the Register, was then or afterwards (when, does not appear,) allowed and decreed by the Orphans Court of the city and county of Philadelphia. That court is the proper tribunal for such allowance, and its decree upon this matter would be, in the courts of Pennsylvania, conclusive, except upon appeal. By this account, it appeared that a

[1] If the personal representative has squandered the personalty, and the conditor has exhausted all remedies against him and his sureties, the land may be sold to pay debts. *Nettleton* v. *Dixon*, 2 Ind. 446; *Matter of Bingham*, 127 N. Y. 296 (but compare *Kingsland* v. *Murray*, 133 N. Y. 170, 174–175); *Badger* v. *Jones*, 66 N. C. 305; *Scott* v. *Ashlin*, 86 Va. 581. *Pry's Appeal*, 8 Watts 253; *Maxwell* v. *Smith*, 86 Tenn. 539 (*semble*), *contra*. If a loss of the personalty not due to the fault of the personal representative occurs after death of the decedent, the land may be similarly sold. *Evans* v. *Fisher*, 40 Miss. 643; *Lee* v. *Beaman*, 101 N. C. 294.

[2] Part of the opinion is omitted.

balance of $1693.06 was due to the accountant, it being the excess of debts and expenses of administration paid by her above the assets which she had received.

The will bequeathed three specific legacies, and gave the remainder of his personal property on the premises which he occupied (a hotel in the city of Philadelphia) for the use of his wife while she occupied the hotel, and afterwards to his wife and daughter, Mary Ann. It devised one parcel of land in Camden county, to his son Robert, another parcel at Gloucester to his wife in fee, and the rest of his lands at Gloucester to his wife for her use and maintenance of his minor children until the youngest should arrive at twenty-one years of age, and then to all of his children equally, in fee.

Robert sold and conveyed his lot in fee, in 1860, and the respondent sold and conveyed her lot in fee, March 11th, 1868, since the decree in the Orphans Court at Camden.

The lands directed to be sold are those of which the use is given to the respondent during the minority of testator's children, which, and as well as the lot devised to her, she had occupied since testator's death, and of which she had received the income.

The application to the Orphans Court for sale was made May 28th, 1867, after the youngest child would have been twenty-one, and after the respondent's estate in these premises had terminated. The rule to show cause was granted on the day of application, and was to show cause on the 27th day of July, one day less than two months from the date of the order.

A copy of the account allowed in the Orphans Court of Philadelphia was annexed to the petition. The account of the estate exhibited under oath at the application, was annexed to the petition, and stated that "there is no personal estate, the same having been exhausted in the payment of debts, as per account in Orphans Court of Philadelphia annexed"; and that the account of the debts was the balance found due by said account and decree, $1643.66, with interest from April 6th, 1855, which may be presumed to be the date of the decree, which nowhere else appears in the proceedings. The account, as allowed, charges the respondent with $4000.16 as the amount of the inventory, and $882 as the value of two hundred and eighty gallons of brandy not in the inventory. But the inventory was not annexed to the petition or account, and though among the papers in this court, it does not appear that it was before the court below at the making of the order.

The first objection which I shall consider is, that there was not exhibited to the Orphans Court on application for the rule to show cause, such account of the personal estate and debts, under oath, as is required by the statute. Nix. Dig. 855, sec. 15. The account annexed to the petition certainly does not comply with the statute; it says, there is no personal estate, the same having been exhausted in payment of debts. This might be said in all cases, as the statute

requires that the personal estate shall all be first administered. The statute can only be complied with by a full statement of all the personal estate which the decedent left at his death, whether administered or unadministered, collected or not collected, and even if part has been destroyed by fire, or lost, without default of the executor. But this statement under oath refers to the account allowed in Philadelphia, a copy of which is annexed; such reference would be sufficient, if that contained a sufficient account of the personal estate. But on examination it only refers to an inventory filed there, except as to the brandy. As that inventory was not annexed, the question arises, is such reference a sufficient account? By the practice in our Orphans Courts for nearly ninety years, and the forms of proceeding as given in all the books of precedents, from *Griffith's Treatise*, in 1797, to *Nixon's Forms*, a reference to the "inventory" or "appraisement" for the amount of the personal estate, is taken as sufficient. But this, in all these cases, must mean the inventory required by our law, and exhibited and recorded in the office of the surrogate or clerk of the Orphans Court and therefore, in legal contemplation as well as in fact, before the Orphans Court. A reference to an account on file in the office of the clerk in chancery, or in a probate office in Nevada or Alaska, or in the vaults of the Bank of England, would not much enlighten the court or those interested in opposing the sale. This account, though nearer at hand, is no better until supplied. Nor does the oath state, either directly or by implication, that the inventory or account contained all the personal estate of the testator. If would seem that the chattels specifically bequeathed are in neither; and it may be that in Pennsylvania such specific legacies, if delivered, need not be included in the final account of the general estate. The account of debts and credits does not state that the debts for which the personal estate was paid out were the debts of the testator; and the charges for rent and gas paid, in the account allowed, at long intervals after the testator's death, may have been for rent of the leased premises occupied by him, bequeathed to the respondent as part of the residue of the personal estate, for which she, and not the estate, would be liable, and which would be readily allowed on an *ex parte* account if he had signed a lease extending over that time. I do not think the account exhibited is sufficient for either of the objects for which it is required, to show the court whether the rule to show cause should be granted, or those interested in the lands whether there was, in fact, ground for the application, so that they could intelligently determine whether they should oppose it or not.[1]

The account stated in Philadelphia is binding and conclusive there, and must be equally so in this state. But it is like other judi-

[1] And see *Gregory* v. *Taber*, 19 Cal. 397; *Rapp* v. *Matthias*, 35 Ind. 332; *Ford* v. *Walsworth*, 15 Wend. 449; *Matter of Haxtun*, 102 N. Y. 157; *Crippen* v. *Crippen*, 1 Head 128. Compare *Wattles* v. *Hyde*, 9 Conn. 10.

cial proceedings, binding only on those who are or could be parties to it. It was an account of the *personal* estate, in which the appellants had no interest. The only bequest to Catharine was the specific one of a silver soup ladle, which was not in the account. As devisee of the real estate, she could not be heard on that account. She had no interest in the personal estate there in question. That she had an interest because the account could be offered in evidence on the application for sale of lands, assumes the question. In the account as it stood primarily she had no interest, and could not intervene because incidentally it might affect her. Else the holder of a note not yet due, might intervene in a suit by a third person against the maker, because such recovery might sweep away the property and leave nothing for his debt. All persons interested in the personal estate as creditors, legatees, or next of kin, were or could have become parties to such account, and are bound and concluded by it, but no others are. There being nothing to show what persons are considered as parties to this account by the law of Pennsylvania, I must determine that question upon general principles applicable to such cases, and by analogy to the law of this state.

The next reason is, that the Orphans Court did not determine what was the amount of the deficiency of the personal estate to be raised by the sale of the lands. It is not directly required by the statute that the court shall ascertain and adjudge what is the amount of the deficiency. But it is required to determine whether the whole or only a part, and then what part of the decedent's lands, is necessary for the payment of his debts. It cannot determine these matters without determining what that deficiency is; and therefore, by clear implication, it is required to determine the amount. When land is sold in different parcels, the sale should be terminated whenever the required amount is realized, although the order may include more lands; and in this case it is particularly necessary, as the order directs that after the sale of the first two tracts there shall be sold, thirdly, *so much of* a tract described, containing nineteen lots, as shall be necessary to pay off *the said debts* of the testator, although the debts have not been ascertained. The Supreme Court, in the opinion delivered in *Stiers* v. *The Executors of Stiers*, Spencer 54, established this doctrine; that was on an order to sell lands for payment of debts; the cause was removed from the Orphans Court to the Supreme Court, by certiorari, and their decision is authority in this court, to which the revision of these orders was transferred by the present Constitution. The Chief Justice says: "In my opinion the order is erroneous, because the Orphans Court had not ascertained the extent of the deficiency, nor designated in the order the sum to be raised by a sale of the lands." . . .

The order must be set aside.[1]

[1] As to whether the debts for which the land is sold must be adjudicated before the order for sale, see *Walker* v. *Diehl*, 79 Ill. 473; *Little* v. *Sinnett*, 7 Iowa 324; *Tenney* v.

GRAHAM, ADMINISTRATOR *v.* BROCK, ET AL.

212 Illinois 579. 1904.

APPEAL from the County Court of Mercer county; the HON. W. T. CHURCH, JUDGE, presiding.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Mercer county dismissed the petition of appellant, administrator *de bonis non* of the estate of Benjamin F. Brock, deceased, filed in that court against the appellees, praying for an order to sell real estate owned by said Benjamin F. Brock at his death for the payment of debts of his estate, and appellant prosecuted this appeal.

Benjamin F. Brock died intestate on August 30, 1884, leaving the appellee Mary E. Brock, his widow, and seven children, his heirs-at-law. Letters of administration were issued on September 3, 1884, to August L. Craig and James M. Brock, who filed an inventory of the real and personal estate. The chattel property was taken by the widow on her award, leaving a balance due her. Claims were allowed against the estate, which, together with a judgment recovered against the administrators in the circuit court of Mercer county, amounted to over $5000. On January 2, 1885, the administrators filed a report showing the condition of the estate, and a petition for an order to sell real estate of the deceased to pay debts. The court found that the widow was entitled to a homestead in a certain block in the city of Aledo and dower in all the real estate, and commissioners were appointed, who assigned to her the homestead in said block and set off to her as dower certain blocks and lots in Aledo involved in this proceeding. The administrator sold all the real estate under the decree in that proceeding except the portion set off to the widow for homestead and dower, and the sales amounted to $703.30. On April 28, 1887, the administrators made a final report showing payment of the expenses of administration, and that all claims, except the widow's award and first-class claims, were wholly unpaid. On August 28, 1887, the administrators were discharged by the court, and nothing was done toward any further administration of the estate until January 4, 1904, when appellant was appointed administrator *de bonis non*. After the discharge of the administrators all of the property except one block was conveyed to third parties, and that block was conveyed to one of the heirs, in 1898, for the consideration of $400, by the widow and other heirs. On January 20, 1904, appellant filed his petition for the sale of the lots and blocks set off to the widow for her homestead and dower. It was averred in the petition that the widow had abandoned the homestead in 1899, but appellant afterward dismissed his peti-

Poor, 14 Gray 500; *Smith* v. *Smith*, 27 N. J. Eq. 415; *Sample* v. *Barr*, 25 Pa. 457; *Starkey* v. *Hammer*, 1 Baxt. 438; *New* v. *Bass*, 92 Va. 383.

tion as to the homestead, and the only property involved in the proceeding is that which was assigned to her for her dower. Part of the land was claimed by third parties under conveyances by the widow and heirs, and all of it was claimed under the Statute of Limitations by virtue of claim and color of title and payment of taxes for seven years. The defendants answered setting up their claims to the property, and a hearing resulted in the dismissal of the petition.

Nineteen years had elapsed after the death of Benjamin F. Brock and after the original petition was filed for the sale of real estate to pay debts when the petition in this case was filed, and unless a good reason was given for the delay the proceeding was barred by *laches*. There is no statutory limitation of the right to file such a petition, but it must be done within a reasonable time, and seven years has been adopted by this court as the proper time within which application shall be made. The bar arises from *laches* rather than legal limitation, and if sufficient excuse is given for the delay the mere lapse of time will not bar the proceeding. The determination of the question must depend largely upon the circumstances of each case. *Bursen* v. *Goodspeed*, 60 Ill. 277. The explanation offered in the petition in this case was, that when the dower was assigned the real estate set off was located in a part of the city where there were a great many vacant lots and but few buildings, which were of an inferior quality; that there was but little demand for lots and they were of very little value; that at the time of the sale of the other real estate the property subject to dower would not have sold for more than enough to pay the expenses of the sale, but that the property had recently advanced materially in value and would sell for $600 or $700 a block, subject to the widow's life estate, which had not been extinguished. On the hearing it was proved that the property formerly would have sold for but little subject to the dower, but that there had been a material increase in value in recent years, so that the property would then bring a substantial sum.

The only excuse offered to the court, in the petition or proof, for the long delay, was, in substance, that the property was practically worthless for many years, and for that reason the creditors did not care to have it sold and practically abandoned all intention of proceeding against it, but finding that it had increased in value they concluded to institute the proceeding and appropriate it to the payment of their debts. We do not regard the fact that the property had recently advanced in value as explaining the delay or offering any excuse for not proceeding at an earlier date.[1] There was nothing in the land itself, or its situation, or the condition of the title, to justify or excuse delay; but appellant's position is, that the creditors did not want to proceed against the land as long as it was of little value, and if its value had remained the same would never have done

[1] But see *Killaugh* v. *Hinton*, 54 Ark. 65; *Conger* v. *Cook*, 56 Iowa 117.

so, but are now moved to institute the proceeding merely because of the increase in value. The property is still encumbered by dower, and in that respect the case is like that of *McKean* v. *Vick*, 108 Ill. 373. In that case there was a delay of nearly thirteen years in making the application. The explanation offered was that a lot had been assigned to the widow as a part of her dower and had been occupied by her as a homestead. The explanation was not deemed satisfactory, and the court said that if the fact that the lot was encumbered by the widow's dower and homestead was ever a reason why it should not be sold, the reason still existed. The interest of the heirs in the remainder had neither yielded them anything nor been augmented or rendered more available, while the debt had grown, by the accumulation of interest, until it was almost doubled.

Counsel has found no case where such an excuse as was offered here has been regarded sufficient. It was decided in *Dorman* v. *Lane*, 1 Gilm. 143, that a delay by an administrator for fifteen years to proceed against the real estate for the payment of a claim allowed to himself constituted gross *laches*, which, being wholly unaccounted for, was a bar to his application. In *Moore* v. *Ellsworth*, 51 Ill. 308, there was a delay of eight years, but it was satisfactorily explained by showing that the settlement of the estate had been necessarily delayed by litigation, which ended less than a year before the petition was filed. In *Bursen* v. *Goodspeed*, *supra*, letters of administration were granted on February 5, 1856, and the petition was presented on September 27, 1869. The land had been occupied by the widow, under her right of homestead and dower, up to her death, about two months before the petition was filed. A sale of the land in a proceeding instituted for that purpose in 1858 had been resisted by certain creditors on the ground that it would not sell for more than $2000, of which the widow would be entitled to $1000 in lieu of homestead, and her dower besides. The land still remained in the hands of the heirs and no valuable improvements had been put upon it, and the original proceeding had been continued from time to time and merely suspended without being finally disposed of. It was said that the creditors were not bound to resort to a fruitless and destructive sale, and the land being disencumbered of the homestead and dower and no intervening rights having been innocently acquired, the explanation was sufficient. In *Bishop* v. *O'Connor*, 69 Ill. 431, where there had been nothing to prevent a resort to the county court to compel the administrator to subject the lands to the payment of debts, it was held that the complainants were barred by *laches*. There was a delay of nearly ten years in the case of *Furlong* v. *Riley*, 103 Ill. 628, and the reason offered for the delay was, that the records of the court and the files relating to the estate had been destroyed by fire. This was not regarded as a sufficient excuse, since the petitioner might at any time have had the lost papers and records restored and then have proceeded to sell the land. In the case of

Judd v. *Ross*, 146 Ill. 40, the lands which the petitioner sought to have sold had been set off to the widow as her dower and homestead, and she occupied them until her death, in 1892. As soon as she died and the land was released of the homestead and dower rights the proceeding was instituted. It appeared that the lands, if offered for sale while encumbered, would not have sold for more than enough to pay the costs and the land would have been sacrificed. This was deemed a sufficient explanation for a long delay. The reason given in that case was not that the land was worthless and had recently advanced in value, as in this case. The fact that the land could not have been reached by the creditors at all in satisfaction of their debts was held to be a sufficient reason in *People* v. *Lanham*, 189 Ill. 326, for waiting more than twenty years until the homestead was extinguished. The premises occupied by the widow as a homestead were not worth more than $1000 and were exempt from sale until the homestead estate terminated, and as application was made as soon as the land could be made subject to the debts, there was no *laches*.

We are satisfied with the conclusion of the county court, and the decree is affirmed.

Decree affirmed.[1]

[1] If a reasonable time has elapsed, an application for the sale of real estate will not be entertained. *Estate of Crosby*, 55 Cal. 574; *Wingerter* v. *Wingerter*, 71 Cal. 105; *Mooers* v. *White*, 6 Johns. Ch. 360; *Gunby* v. *Brown*, 86 Mo. 253; *Gregory* v. *Rhoden*, 24 S. C. 90. But circumstances may justify a long delay without loss of rights. *Brogan* v. *Brogan*, 63 Ark. 405; *Reed* v. *Reed*, 94 Iowa, 569; *Flood* v. *Strong*, 108 Mich. 561; *In re* Smith, 43 Oreg. 595. Compare *Falley* v. *Gribling*, 128 Ind. 110. In the following cases it was held that if the statute of limitations for rights entry on land has run, no sale will be ordered. *Ricard* v. *Williams*, 7 Wheat. 59, 113; *Bozeman* v. *Bozeman*, 82 Ala. 389; 83 Ala. 416; *Roth* v. *Holland*, 56 Ark. 633; *Black* v. *Robinson*, 70 Ark. 185; *Scherer* v. *Ingerman*, 110 Ind. 428; *State* v. *Probate Court*, 40 Minn. 296. In the following cases a delay longer than the period of the short statute of limitations for proving claims against the estate was held unreasonable. *McCrary* v. *Tasker*, 41 Iowa 255; *Nowell* v. *Nowell*, 8 Me. 220; *Ferguson* v. *Scott*, 49 Miss. 500; *Hall* v. *Woodman*, 49 N. H. 295. Compare *Conger* v. *Cook*, 56 Iowa 117; *Hatch* v. *Kelley*, 63 N. H. 29; *Ales* v. *Plant*, 61 Miss. 259. In Rhode Island the realty can be reached as long as it remains in the hands of the heir. *Honeyman* v. *Kelliher*, 20 R. I. 564. In some states a special statute controls. *Bockover* v. *Ayres*, 22 N. J. Eq. 13; New York, Code Civ. Proc., Sec. 2702 (Acts (1914) c. 443); *Hope* v. *Marshall*, 96 Pa. 395; *Emerick's Estate*, 172 Pa. 191; *Reinhardt* v. *Reinhardt*, 21 W. Va. 76. Compare *Fisk* v. *Jenewein*, 75 Wis. 254.

That the heir may show that the Statute of Limitations has run against the claim for the purpose of paying which the application to sell the realty is filed, see *White* v. *Joyce*, 158 U. S. 128; *Scott* v. *Ware*, 64 Ala. 174; *Warren* v. *Hearne*, 82 Ala. 554; *Chandler* v. *Wynne*, 85 Ala. 301; *Tarbell* v. *Parker*, 106 Mass. 347; *Champion* v. *Cayce*, 54 Miss. 695; *Bates* v. *Elrod*, 13 Lea 156. But see *People* v. *Lanham*, 189 Ill. 326; *Laffrty* v. *Shinn*, 38 Ohio St. 46.

In *Griswold* v. *Bigelow*, 6 Conn. 258, the defendant in ejectment claimed through *bona fide* purchasers from the devisees of T. The plaintiffs claimed through a later sale by the administrator *de bonis non* of T under order of court in payment of a claim against T's estate arising after his death through breach of his covenant of warranty in a deed. The court said, p. 268: "That an *alienation* of land by the heir or

devisee, has not the effect of discharging the lien, has repeatedly been determined. *Gore* v. *Brazier*, 3 Mass. Rep. 523; *Wyman* v. *Brigden*, 4 Mass. Rep. 150; *Graff* v. *Smith's admr.*, 1 Dall. 481; *Ricard* v. *Williams*, 7 Wheat. 59. If it were otherwise, it would be no fund at all; for the devisee or heir, knowing the necessity of alienation to extinguish the lien, would, in every instance where he apprehended debts beyond the amount of personal property, immediately sell the estate, and thereby entirely defeat the intent of the legislature in making it a fund for the payment of debts. Instead of being necessarily liable, at all events, to the payment of debts, on the exhaustion of the personal estate, in whatever hands it might be, it would be altogether precarious, and defeasible always, by the person who had an interest to defeat it. Here there is no inconvenience. The alienee purchases with open eyes, knowing the condition of the property; and can protect himself by covenants, if he is apprehensive of the existing lien; and the heir or devisee is under no restraint of alienation, except from that which justly arises; the burden to which his title is legally subjected." And see *Hannum* v. *Spear*, 2 Dallas (Pa.) 291; *Nichols* v. *Lee*, 16 Colo. 147; *Myers* v. *Pierce*, 86 Ga. 786; *Baker* v. *Griffatt*, 83 Ind. 411; *State* v. *Probate Court*, 25 Minn. 22; *Rogers* v. *Johnson*, 125 Mo. 202, 216; *Fike* v. *Green*, 64 N. C. 665; *Faran* v. *Robinson*, 17 Ohio St. 242. But see *Smith* v. *Thomas*, 14 Lea 324. Compare *Horner* v. *Hasbrouck*, 41 Pa. 179; *Mowry* v. *Robinson*, 12 R. I. 152.

The sale of lands for the payment of debts is subject to dower. *Doe* v. *Wright*, 2 Houst. 49; *Kenley* v. *Bryan*, 110 Ill. 652; *Leverett* v. *Armstrong*, 15 Mass. 26; *Maple* v. *Howe*, 3 Barb. Ch. 611. Compare *Lewis* v. *Watkins*, 150 Ind. 108; *Scott* v. *Wells*, 55 Minn. 274; *Directors of the Poor* v. *Royer*, 43 Pa. 146.

For the effect of a charge of debts on land which by statute is already liable for debts, see *In re Balls*, [1909] 1 Ch. 791.

SECTION V.

PRIORITY OF DEBTS TO LEGACIES.

SIMMONS *v.* BOLLAND.

3 Mer. 547. 1817.

BY indenture of lease dated the 23d of July, 1798, the mayor and commonalty of Canterbury demised to Simmons (one of the aldermen of their corporation), his executors, administrators, etc., for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, etc., on non-performance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

Simmons, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the defendant Bolland and another (whom he also appointed his executors), upon trust to sell; and after payment thereout of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue of his estate to the plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1,000 from the mayor and commonalty of Canterbury, under their common seal, to the testator; and a sum of £800, 5 per cents, which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of Simmons deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture"; and had actually then lately received a notice to that effect from the corporation. He at the same time admitted

that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The equitable relief sought in this case depends upon a legal question, whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles* v. *Lambert*) reported both by Styles and by Aleyn (Styles, 37, 54, 73; Aleyn, 38 s. c.), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector and Sharp* v. *Gennet*, in Cro. Eliz. 466, where the same question arose, though in a different shape. A legatee sued in the ecclesiastical court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation. Upon this the principal question was, whether the escape was such that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole court agreed, and determined that it was no plea, unless the obligation were forfeited. Coke said, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty *maintenant*, which is in the condition (as 9 E. 4, 12). But otherwise it is, where a Statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual court to proceed according to their own established course, — namely, to compel the legatee to give security to refund the legacy, in case of the executors becoming afterwards liable to be sued upon the

bond. In the argument of *Eeles* v. *Lambert*, this case is noticed by Rolle, Justice: "It was *Nector and Sharpe's Case*, 38 Eliz. that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." (Styles, 56.)

In *Hawkins* v. *Day*, Amb. 160, Lord Hardwicke makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of Ambler's report of this case; for his statement is found to correspond with the Register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord Hardwicke stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects."

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be made over on the plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security.

GILLESPIE *v.* ALEXANDER.

3 Russ. 130. 1826.

In this suit, which was instituted for the administration of General Gillespie's estate, the original decree, made on the 15th of November, 1820, directed, among other things, the usual accounts of his assets, and of his debts and legacies. On the 23d of March, 1823, the Master made his report; in which he certified, that several creditors had come in before him and proved their debts, amounting in the whole to £269 19*s.* 2*d.* By an order, made on the 15th of April, 1823, directions were given for paying the debts reported due; and they were accordingly paid. The decree on further directions, made on the 12th of January, 1825, after ascertaining the rights of the parties, providing for the payment of the costs, and reciting that the creditors of the testator had been paid their respective debts set forth in the schedule to the Master's report, ordered, that the residue of the fund in court, and also the bank annuities which should be purchased in pursuance of the directions therein contained,

should be apportioned among the legatees and the annuitants, except such of them whose legacies might appear to have been paid; and such apportionments, when appropriated in the manner therein directed, were to be considered as in discharge of the several legacies, so far as the value of such apportionments should extend. There was also a direction, that the executors should be allowed the sums which they had paid in discharge of legacies.

In November, 1825, Alexander Lean, claiming to be a creditor of General Gillespie, petitioned to be at liberty to go in and prove his debt; and that so much of a sum of £14,177 16*s.* 9*d.* three per cent bank annuities, then standing in the name of the accountant-general, to the credit of the cause, as might be sufficient to raise the sum which should be reported due to him, might be sold for payment of his demand. On the 29th of November, 1825, an order was made, that he should be at liberty to go in and prove such debt, he paying the costs of the petition and of the proceedings before the Master. On the 26th of July, 1826, the Master reported that £1,636 1*s.* 5*d.* was due to the petitioner from the estate of General Gillespie.

In the mean time, about December, 1825, the fund in court had been apportioned by the Master among the annuitant and the unsatisfied legatees; and part of it was paid out in discharge of some of the legacies. A few of the legacies had been paid long before; and those payments, though not made under the authority of the court, had been directed to be allowed to the executor by the decree of January, 1825.

Lean then presented a petition, stating, that, pending his proceedings in the Master's office, the parties had proceeded to make the apportionment under the decree on further directions; and that there were standing to the credit of this cause the following sums of three per cent consolidated bank annuities: —

To the plaintiff, the annuitant's account	£5,045	18	4
To Selina Gillespie's account	4,863	10	8
To the account of the two children by the Malay girls	426	12	10
Four and Leary's account	90	3	6
Total	£10,426	5	4

The prayer was, that the report might be confirmed; that the Master might be ordered to apportion to Lean as much of the several sums, standing in the name of the accountant-general to these several accounts, as should be sufficient to satisfy his debt of £1,636 1*s.* 5*d*; and that the accountant-general might be directed to sell so much of the bank annuities so apportioned, as would be sufficient to pay the demand.

All these sums, except that carried to the annuitant's account, had been kept in court by reason of the infancy of the persons entitled to them, or their residence in a foreign country.

THE MASTER OF THE ROLLS. [SIR JOHN SINGLETON COPLEY.] It is said, it was the duty of the creditor to have applied to the court, in order to prevent any of the legacies from being paid, till his demand was satisfied; but I do not see why the *onus* of protecting the fund should be thrown on him. He is entitled to have his debt paid; and it must be apportioned among the funds of the different legatees, whose legacies still remain in court. Those legatees are not without their remedy: they can call on the other legatees to contribute.

The order of the Master of the Rolls confirmed the report, and directed the debt to be apportioned among the four sums of stock remaining in court, and to be paid by the proceeds of a proportionable part of each of the four sums.

From this order the infant, Selina Gillespie, appealed.

The petition stated, that there was still considerable outstanding personal estate of the testator, which was in the course of being gotten in; and it insisted, that Lean ought not to receive any part of his debt out of the four sums carried over to particular accounts, but only out of any outstanding estate which might be gotten in; that, at all events, it was unjust to throw the whole of the debt upon persons, whose funds, though definitively appropriated to them, had, from accidental circumstances, remained in court; and that the funds so appropriated, if chargeable at all, ought to be charged only with a proportion of the debt, according to the ratio which those funds bore to all the annuities and legacies bequeathed by the testator. The prayer was, that the order of the Master of the Rolls might be reversed; that Lean might not receive any part of his debt out of the appropriated funds set apart for Selina Gillespie; that, at any rate, the whole of the debt might not be paid out of the four sums set apart for Selina Gillespie, the annuitant, the two children by the Malay girls, and Four and Leary, but only such part thereof as should be just, regard being had to the proportion which that annuity, and those three legacies, bore to the other legacies bequeathed by the testator; and if any part of the sum apportioned in respect of Selina Gillespie's legacy should be paid to the creditor, then that provision might be made for making the same good of her, out of any outstanding or future personal estate of the testator, which might be gotten in.

THE LORD CHANCELLOR [ELDON]. Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of

that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

The present case is involved in much singularity. Previously to January, 1825, several of the legacies had been paid by the executor; and the order of January, 1825, is a judgment of the court in favor of the executor, with respect to these payments, — a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following November the creditor makes his application: the court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In December, 1825, the Master makes his report, and appropriates the fund in court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the court was not, that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees, if he had applied before the other legacies were paid, and that he should be left to recover the residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie, of enforcing contribution against the other legatees?

Lord Eldon had not delivered a final judgment, when he resigned the great seal; but after he quitted office, the parties having consented to be bound by his opinion, he gave the following decision: —

"My memory does not furnish me with the recollection of any case alike to this. It may, therefore, not be improper that this should be brought before the court again, and spoken to by counsel; after they have endeavored to find a precedent or precedents for such an order as that complained of.

"If no precedent to the contrary — that is, no precedent in support of the order — can be cited, I am of opinion, that, — although, if the fund carried to the account of a legatee was residue, after the payment of debts and legacies, the creditor would be entitled to be wholly paid, — yet, if adult legatees are paid, and, on the other hand, legatees, who are infants or have only partial interests, are not paid, but have funds carried to their account, such last-mentioned legatees ought to be considered, as between themselves and

a creditor not coming in sooner, as not liable to pay him wholly out of what is so carried to their account, but only to pay him a due proportion of the debt; and that he must seek the payment of the rest of his debt, in proper proportions, against those who have been actually paid. I think, therefore, this order must be altered, and the creditor take only such a proportion; leaving the creditor at liberty to apply, as he shall be advised, against other legatees paid, and against funds which may yet come in; and leaving these petitioners also at liberty to apply, as they may be advised, against funds which may yet come in.

"If a precedent can be found to the contrary, that precedent must support the order as made."

The minutes of the order declared, that Alexander Lean was not entitled, as against the plaintiff, the annuitant, and the legatees, — in respect of whose annuities and legacies the several sums of bank annuities had been carried over, as in the petition of appeal mentioned, — to be paid the whole of his debt and interest proved before the Master, but only such proportion thereof as the value of the annuity, and the amount of such legacies, bore to the amount of the other legacies bequeathed by the testator's will, which had been paid. It was referred to the Master to ascertain the contributive portion of the debt and interest, which ought to be paid out of each of the four sums of bank 3 per cent annuities, standing in the name of the accountant-general, to the four several accounts before mentioned: directions were then given for raising out of the sums standing to each account its contributive proportion of the debt: and it was ordered, that Alexander Lean should be at liberty to apply to the court, as he might be advised, against such of the legatees as had received payment on account or in satisfaction of their respective legacies; and that he and the annuitant and legatees, in respect of whose annuity and legacies the aforesaid four several sums had been carried over, should be at liberty to apply to this court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.

NORMAN *v.* BALDRY.

6 Sim. 621. 1834.

On the marriage of William Baldry with Ann Freston, he, together with Simon Baldry, executed a joint and several bond, dated the 7th of October, 1802, to W. Lewis, conditioned for the payment, by the heirs, executors or administrators of William Baldry, within three months after his decease, of £490 to Ann Freston, in case she should survive him; but, in case she should die in his lifetime, then

for the payment by him, of £200 within six months after the death of Ann Freston, to the persons therein named.

Simon Baldry died in March, 1820. Ann Baldry died in April, 1831, leaving her husband her surviving.

William Baldry having become insolvent, the persons entitled to the £200 under the bond, filed, in 1832, a creditor's bill against the executors of Simon Baldry.

The executors, in their answer, said that they had applied the whole of Simon Baldry's personal estate in payment of his debts *and legacies:* and that they never heard of the bond until October, 1831.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL] said that he had always understood the law to be that an executor who had paid simple contract creditors of his testator, a bond being in existence but not then payable, ought to be allowed those payments; but that an executor was liable, if he paid the legatees, notwithstanding he had no notice of the bond: and that he was not disposed to agree to what was attributed to Lord Kenyon in the case cited.[1]

IN RE KING.

MELLOR *v.* SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY COMPANY.

[1907] 1 Ch. 72. 1907.

NEVILLE J.[2] In this case the executors seek the direction of the Court to distribute the estate among the residuary legatees notwithstanding the claim of a limited company in respect of unpaid shares, no calls having been made. It appears to be the practice to direct such distribution notwithstanding the existence of contingent claims, and, as the law stands, I think it is clear that the order of the Court in such a case exonerates the executors from ultimate liability to the creditor. The practice appears to have grown up gradually and in a manner which is not to my mind altogether satisfactory. One cannot help seeing that the rights of absent parties of whose claim the Court has notice may be prejudicially affected by the order. Nor are the authorities themselves in a very satisfactory state, but I think the outcome is reasonably clear.

The first case I have been referred to is *Fletcher* v. *Stevenson*, 3 Hare, 360, before Wigram, V.-C. In that case the Vice-Chancellor directed that the whole of the residuary estate of the testator and the income should be retained for the purpose of providing a fund to satisfy, if necessary, future claims for rent. The Vice-Chancellor

[1] *Chelsea Water Work Co.* v. *Cowper*, 1 Esp. 275, must be considered overruled. See *Spode* v. *Smith*, 3 Russ. 511; *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122.

[2] Only the opinion on the merits is given.

says this, 3 Hare, 370: "The widow's claim is opposed by two parties, first, by the executor: and, secondly, by the legatees in remainder. So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the Court; but in considering what degree of protection is due to the absent covenantee, I am bound to consider whether the Court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." That is the ground on which the Vice-Chancellor refused to part with the fund, and I must say that what the Vice-Chancellor says seems to me of very great force. The next case cited in which the matter came before the Court is *Dean* v. *Allen*, 20 Beav. 1. The side-note is: "Where an estate is administered and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees." That case is a clear authority upon the point that the direction of the Court exonerates the executors from liability to the creditor, but it is not very satisfactory because it provides for indemnity to the trustees, and does not point out or apparently recognize any inconsistency between the doctrine that the executors are entirely exonerated from liability and the provision of indemnity for them. The point again came before Sir John Romilly in *Waller* v. *Barrett*, 24 Beav. 413, and there the Master of the Rolls gives reasons for what he states to be the practice which are at all events intelligible. He reiterates the doctrine of exoneration. [His Lordship read the head-note to that case, and continued: —] The Master of the Rolls says, 24 Beav. 418: "I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceedings, and yet, if he do not come in and claim, his only remedy in this Court is against the legatees. In the case of *March* v. *Russell*, (1837) 3 My. & Cr. 31, 41, Lord Cottenham made this observation: 'Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee.' I hold that this, in fact, is the principle which governs these cases, that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise thereafter), that the Court requires what is called 'an indemnity to the executor' to be given; but if he has stated the facts to the Court, and has acted under its direc-

tion, I apprehend that his indemnity is complete and perfect, so far as he is concerned."

That is an intelligible account of the origin of the practice. I am surprised that Lord Romilly should have professed himself to be at a loss to conceive on what principle a contingent debt can be differentiated from an existing debt, but he does class the two together and declare that the order of the Court exonerates the executor on distribution of the assets. Further, one cannot help feeling that the reason given for the provision of the indemnity is unsatisfactory, because it is curious that an indemnity of this kind should be held to give a greater degree of security to the executor than the order of the Court, which exonerates him altogether. However, there it is, and that is something upon which one can proceed, whether the grounds upon which it is founded, as stated by the learned judge, commend themselves to one's ideas of the general practice of the Court or not.

The next two cases to which I was referred are both before Kindersley, V.-C. In the first, *Smith* v. *Smith*, 1 Dr. & Sm. 384, the doctrine of exoneration was referred to, and it was held the executors were not in that case entitled to an indemnity, and the Vice-Chancellor says, 1 Dr. & Sm. 387: "Supposing there had been no dealing with the leaseholds by the executors, would they have been now entitled to any indemnity? In following the previous decisions, I have held that executors have such right; but I concur with the Master of the Rolls in thinking that where an executor fairly represents everything to the Court the decree, directing him to deal with and distribute the property, must operate as a complete indemnity to him; and that therefore an executor cannot need any other indemnity. It has, however, been suggested, that there ought to be a fund set apart by way of indemnity, not for the benefit of the executor, but for the benefit of the lessor, in case of there being at any future time a breach of covenant. Now if the lessor is entitled to any such equity as this, it would seem to follow that he might come to this Court to assert such equity, and to ask the Court to set apart a sum of money out of the testator's assets, to provide for the event of a future breach of covenant, for which he might be entitled to recover damages. But it has been held that a lessor cannot be heard in this Court to maintain any such right. In truth the whole doctrine on the subject is in a very unsatisfactory state; and does not seem to be founded on sound principles." The case came again before the same Vice-Chancellor in *Dodson* v. *Sammell*, 1 Dr. & Sm. 575. In that case a fund which had been set apart to indemnify executors was ordered to be paid out to the residuary legatee, such indemnity since the passing of Lord St. Leonards' Act (22 & 23 Vict. c. 35) [1] being no longer necessary as a protection

[1] "Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be

to the executor. The Vice-Chancellor said, 1 Dr. & Sm. 578: "With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher* v. *Stevenson*, 3 Hare, 360, Wigram, V.-C., thought that although the decree of the Court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King* v. *Malcott*, 9 Hare, 692, Turner, V.-C., decided that there was no such equity." With great respect, I venture to think that the inference which the learned Vice-Chancellor draws in that case is not a necessary inference, and that the reason given by Wigram, V.-C., for retaining a security for the contingent creditor was an intelligible reason which was not open to the observation made by Kindersley, V.-C., in that case. However, from that time on it seems to have been the practice not to retain any part of the assets. Then after a considerable number of years — I have not been referred to any case decided between 1861 and 1904 — the case came before the late Byrne, J., in *In re Nixon*, [1904] 1 Ch. 638. The head-note in that case is, "On making an order for the distribution of the estate of a testator amongst his residuary legatees the Court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors." That I understand to apply to all cases where there is not a personal liability on the part of the executors to pay out of their own moneys the claim of the creditor. The learned judge went through the cases and came to the conclusion stated in the head-note, and I think that, having regard to the authorities, it is necessary for me to proceed on the same footing.

It is pointed out in one of the cases that the exoneration must, or at all events may, only operate in the case of an administration action. There may be a distinction in the protection afforded by a direction of the Court taken under Order LV., r. 3, without administration. It is obvious that the Court cannot direct distribution of

charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively." — Stat. 22 & 23 Vict., c. 35, § 29 (1859).

the estate so long as it is not satisfied that there are no longer any immediate claims outstanding. I think, therefore, there should be an inquiry as to debts.

The order made directed an inquiry as to debts and pecuniary legacies, and which of them had been paid, and referred the summons back to chambers, with leave to amend and liberty to apply.[1]

PEABODY *v.* ALLEN, ADMINISTRATRIX.

194 Mass. 345. 1907.

HAMMOND, J. This is a petition brought under the provisions of Pub. Sts. c. 136, § 13 (now R. L. c. 141, § 13), to require the respondent, as administratrix of the estate of Elbridge G. Allen, to retain in her hands a sum sufficient to satisfy the claim of the petitioner upon which no right of action existed at the time when the petition was filed. The Probate Court made a decree in favor of the petitioner, and the case is before us upon an appeal by the respondent from a decree of a single justice of this court affirming that decree.

The statute provides that "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same."

The question is whether the claim of the petitioner is one which at the time of the filing of the petition could have been then described as one which "is or may become justly due" within the meaning of those words in the statute. The words "or may become" were inserted in the statute by St. 1879, c. 71. Before that amendment it was held in *Ames* v. *Ames*, 128 Mass. 277, that where the existence of a claim depended upon a future contingency it was not a debt justly due within the meaning of this statute (Gen. Sts. c. 97, § 8). In that case the contract upon which the claim was based provided for the payment of certain sums of money upon certain contingencies. At the time of the filing of the petition the contingencies had not happened, and there was no certainty that they would happen or that anything ever would be due under the terms of the contract; and it was said that "the provisions of [Gen. Sts.] c. 97, § 8, are confined to cases of creditors who have debts

[1] See *March* v. *Russell*, 3 Myl. & Cr. 31; *Bennett* v. *Lytton*, 2 J. & H. 155; *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; *Williams* v. *Headland*, 4 Giff. 505; *Waller* v. *Barrett*, 24 Beav. 413; *In re Blow*, [1914] 1 Ch. 233.

due from the estate, either payable presently or in the future. They do not extend to cases where the deceased has entered into a contract which may possibly result in a debt at some future time, but upon which there is no existing debt at the time of the application to the judge of probate."

The claim arises out of a contract between the petitioner and the intestate relating to the purchase of a certain parcel of real estate upon Buckingham Street in Boston. The estate had been purchased for $10,000, the money having been furnished by Peabody, the petitioner; and the agreement in substance provided that the profits and losses of the venture were to be shared equally between the parties. The house was sold at a loss. Between the purchase and the sale the value of the property had been adversely affected by the change of grade in that neighborhood under the right of eminent domain, and at the time of the sale there was a right to compensation against the railroad corporation which made the change. The house was sold for $7,128. The income from the property during the time it was held under this agreement was less than the amount of the interest upon the sum advanced by the petitioner and the expenses. There was therefore a loss unless the deficiency should be made up by the amount to be recovered from the railroad corporation, and there was an obligation on the part of the intestate to pay to the petitioner one half of the loss as it finally should prove to be. At the time of the filing of this petition a suit brought by the petitioner to recover the compensation was pending. Here then is an existing contract to pay to the petitioner one half of the loss incurred in a certain joint venture. The property has been sold at a loss. To make up the deficiency there is a claim existing against a third party, which claim the petitioner already is prosecuting in the proper court. The petitioner represented, and the decree of the court shows that the court agreed with him, that there was a probability that the claim against this third party when recovered would not make up the deficiency, and hence that under the terms of the contract some portion of the amount required to make up the deficiency would be justly due to the petitioner. At the time of the filing of the petition every element upon which the liability of Allen was based had become certain and fixed except the simple question as to the amount of the sum to be recovered from a third party whose liability also had become fixed. In a word, the liability of the estate as it finally should turn out to be was fixed by circumstances existing at the time of the filing of the decree. Is such a claim within the statute?

In two cases this court has touched upon the meaning of the phrase in question: *Bullard* v. *Moor*, 158 Mass. 418, and *Forbes* v. *Harrington*, 171 Mass. 386. In the first it was said by Holmes, J., that the "statute must be construed reasonably. It cannot have been intended to enable any one, who has an outstanding contract

made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due upon the contract, and when it still is impossible for the Probate Court to form any estimate of what amount should be retained as 'sufficient to satisfy the same' in the words of the Statute."

The case at bar seems clearly distinguishable from these two cases. The language of the statute plainly implies that there may be at least some uncertainty as to whether or not the debt may be justly due; and while it may be difficult to give in advance any definition of the degree or kind of uncertainty allowable in a claim under the statute, it should be "construed reasonably," and it seems reasonable to hold that the statute included a claim like that of this petitioner where all the elements of liability were fixed except the amount finally to be credited upon the loss.

The cause of action did not arise until the settlement of the suit for damages against the railroad corporation. It was a joint venture. *William* v. *Henshaw*, 11 Pick. 79. *Fanning* v. *Chadwick*, 3 Pick. 420.

Decree affirmed.[1]

ESTATE OF MITCHELL.

MATHEWSON ET AL., RESPONDENTS *v.* GEER ET AL., EXECUTORS, ETC., APPELLANTS.

121 Cal. 391. 1898.

APPEAL from an order of the Superior Court of Stanislaus County directing a partial distribution of the estate of a deceased person to legatees. William O. Minor, Judge.

The facts are stated in the opinion.

SEARLS, C.[2] John W. Mitchell died testate November 26, 1893. By his last will he bequeathed to Grace Mathewson, Minnie Henderson, and Charles Henderson (the assignor of Ellen Wetherbee and B. Schwartz & Co.) legacies of $5,000 each, amounting in the aggregate to $15,000. The will was admitted to probate December 16, 1893, and letters testamentary issued to Henry F. Geer and George S. Bloss, the executors named therein. They duly qualified and gave notice to creditors. The decree establishing such notice was made November 21, 1895. An inventory and appraisement was filed November 21, 1895, showing the estate to be of the value of $1,364,307.55. The time for presenting claims had expired, and secured claims amounting to say $160,000, and unsecured claims amounting to $18,000, had been allowed. The respondents filed

[1] See *Bassett* v. *Drew*, 176 Mass. 575, *ante*, p. 659; *Electric Welding Co.* v. *Fitz*, 215 Mass. 315, *ante*, p. 663.

[2] Part of the opinion is omitted.

their petition for a partial distribution under Sec. 1663 of the Code of Civil Procedure, on the seventh day of April, 1896, containing allegations which, if true, entitled them to distribution.

The executors (appellants) filed their opposition to the petition May 16, 1896, averring in substance that there is not sufficient funds on hand or readily attainable to pay the legacies, and that to pay them would embarrass the administration of the estate; that they had been unable to sell the real estate although they had tried to do so, etc.

A hearing was had May 16, 1896, after due notice to all parties in interest, and the cause was submitted and taken under advisement by the court.

On September 11, 1896, the court denied the application of the petitioners "without prejudice to making another application." Thereafter, and on the seventeenth day of December, 1896, the respondents gave notice to appellants of a motion to set aside the order of September 11th, and for a rehearing and reargument of the application for a partial distribution. This motion was based upon a stipulation between appellants and respondents executed after the submission of the case and before its decision, viz., on May 26, 1896, whereby it was agreed that no further proceedings should be had in the application for distribution, and that the case should stand submitted and not be decided for six months from date. In consideration thereof the executors agreed to pay to each of the three respondents the sum of eleven hundred and sixty-six dollars and thirty-three and two-thirds cents on or before June 15, 1896. These several sums were paid to the respondents. This stipulation was not filed, and so far as appears was not brought to the attention of the court before its decision in the case. Upon the further hearing and argument the former order was set aside and an order or decree was entered granting the petition and ordering "the executors of said estate to pay the legatees or their assigns their respective shares of said estate under the will of said deceased, such payments to be made one-third on or before the first day of March, 1897, and the balance on or before the thirtieth day of May, 1897, with legal interest thereon, less the inheritance tax thereon." It was further ordered "that no bond be required of said petitioners on said distribution." The order is dated February 27, 1897. Appellants excepted to these rulings and prosecute this appeal therefrom. The case comes up on a bill of exceptions.

The order is an appealable one. "An appeal may be taken to the supreme court, from a superior court, in the following cases. * * * From a judgment or order * * * refusing or allowing, or directing the distribution or partition of an estate, or any part thereof." (Code Civ. Proc., Sec. 963.)

Several points are made by appellants for reversal, only one or two of which need be noticed.

At the hearing petitioners introduced in evidence the admission of appellants that the unsecured claims against the estate were about $18,000. The order of distribution to the petitioners was for, the whole legacies left them by the last will, and, as before stated, it was further ordered "that no bond be required of said petitioners on said distribution." This was error.

Section 1658 of the Code of Civil Procedure provides that at any time after the lapse of four months from the issuing of letters testamentary, etc., any devisee or legatee may apply to have the legacy or share of the estate to which he is entitled given to him "upon his giving bonds, with security, for the payment of his proportion of the debts of the estate."

Section 1661 provides for the amount and character of the bond.

Section 1663 of the same code provides that any heir, devisee, or legatee may, at any time after the lapse of one year from the issuance of letters testamentary or of administration, apply by petition upon notice for the distribution to him of the net proceeds of the share of the estate to which he will be entitled. Before receiving his share he must give a bond as required by sections 1658 and 1661, "Provided that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the Court may dispense with the bond."

The foregoing quotation shows that it is only in cases where the time for presenting claims has expired, and that all claims allowed have been paid, or are secured by mortgage, etc., that the court is authorized to dispense with the bond. It reasonably appears in the present case: (1) That the time for presenting claims had expired; (2) That $18,000 of claims were allowed which had not been paid; (3) That they were not secured by mortgage upon real estate or otherwise, and hence that the court erred in not requiring a bond.

Respondent relies upon the case of *Estate of Levinson*, 98 Cal. 654, to sustain the position that "the question as to whether a bond should be given by any of the parties to a partial distribution is entirely within the discretion of the court below." It is true the language quoted is found in the opinion in that case, but it is not in point here for the reason that there it appeared from the record that the time for presenting claims against the estate had expired, and that "all claims had been paid." The expression used by the learned judge was correct as applied to the facts of that case, but is not the law in a case like the present. See *In re Crocker*, 105 Cal. 368; *In re Estate of Hale*, *ante*, p. 125. . . .

On account of the two errors indicated, we recommend that the order appealed from be reversed, and the cause remanded for further proceedings consistent with this opinion.

CHIPMAN, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded for further proceedings.

McFARLAND, J.

HENSHAW, J., concurring. I concur in the judgment of reversal. Upon the question of the sufficiency of the notice to confer jurisdiction to make the order in question I express no opinion.

TEMPLE, J., concurred in the judgment.

Hearing in Bank denied.[1]

[1] Compare *Pound* v. *Cassity*, 166 Mo. 419; *Steere* v. *Wood*, 15 R. I. 199. On the right of a legatee or distributee to obtain payment before the time for proving claims has expired, see 2 Woerner, Am. Law of Adm. (2d. ed.), § 560.

SECTION VI.

PRIORITIES BETWEEN PROPERTY DEVISED, BEQUEATHED, AND INTESTATE.

IN RE KEMP'S ESTATE.

KEMP *v.* DANDISON.

169 Mich. 578. 1912.

ERROR to Oakland; Smith J. Submitted January 24, 1912. (Docket No. 79.) Decided March 29, 1912.

Lucy Kemp, executrix of the estate of Obadiah Kemp, presented to the probate court for Oakland county for allowance her final account which was, in part, disallowed. Said executrix appealed to the circuit court. The order being affirmed, the executrix brings error. Reversed.

BIRD, J. This case involves the construction of the third and fourth clauses of the last will and testament of Obadiah Kemp, deceased. The will is as follows:

"*First.* — I direct that all my just debts and expenses be paid.

"*Second.* — I give, devise and bequeath to my wife, Lucy Kemp, the homestead where we now live, viz.: The southwest quarter of the southeast quarter of section twenty-two, in town three north of range ten east, Oakland county, Michigan, forever, together with the household goods and furniture and household articles and belongings contained in our dwelling house situate thereon, and together with my horse and buggy and farming tools and implements and other articles of personal property contained in and the barns and out-buildings on said premises.

"*Third.* — I also give and devise to my wife aforesaid the sum of fifteen hundred dollars, to be paid to her within . . . after my decease from the proceeds of any notes or mortgages belonging to my estate or from any other property of my estate; also I devise to her lot 5, block 5, Rundel's addition, city of Pontiac, said county.

"*Third.* — Having already given to my son, William H. Kemp, by the terms of a contract, the southwest quarter of the northeast quarter of section twenty-seven, in town three north of range ten east, county of Oakland, State of Michigan, the same to be his at my death on certain conditions specified in the contract, I do now devise the same to him absolutely forever.

"*Fourth.* — All the rest, residue and remainder of my property real and personal, consisting in part of notes against my said son, William H. Kemp, amounting to seventeen hundred dollars principal, I give, devise and bequeath to my daughter, Fanny Dandison.

"*Fifth.* — Should any person or persons attempt to contest the validity of this will, then all devises and bequests herein in favor of such person or persons shall be utterly void and of no effect,[1] and such person or persons and their children shall have no share in my estate whatever, and such share or shares shall go to the other next nearest heirs at law.

"*Sixth.* — I hereby nominate my said wife, Lucy Kemp, to be the executrix of this will."

The estate was administered by the widow, and, upon the hearing of her final account in probate court, it developed that there were insufficient assets in the estate to pay the general legacy of $1,500 to herself, without using the proceeds of the notes mentioned in the residuary clause. It therefore became a question as to which legacy should abate.

Counsel for the widow contend that the notes are a part of the residuary fund, and that the general rule should apply and the general legacy be preferred to the residuary legacy. Counsel for the daughter admit the general rule, but insist that this is an exception to the general rule; that in this residuary clause the testator has created a specific legacy of the notes of William H. and given them to the daughter, and that this specific legacy should not abate in the interest of the general legacy.

On the trial in the circuit court, parol testimony was received to aid the court in determining what is claimed to be an ambiguity in the will. While the construction of clause 4 is not free from doubt, we do not think it is involved in such doubt as would warrant us in resorting to extrinsic evidence to aid in its construction.

It is an unusual practice in the preparation of wills to create a specific bequest in the residuary clause; but the cardinal thing to be kept in mind is the intention of the testator, and, if it is clear that the testator so intended it, the provision should be given effect. This court recently gave effect to such a provision. *In re Corby's Estate*, 154 Mich. 353 (117 N. W. 906). The general rule, however, is that an enumeration of specific articles in a residuary clause will not make the bequest specific as to such articles. *Le Rougetel* v. *Mann*, 63 N. H. 472 (3 Atl. 746); *Estate of Painter*, 150 Cal. 498 (89 Pac. 98, 11 Am. & Eng. Ann. Cas. 760); *Stehn* v. *Hayssen*, 124 Wis. 583 (102 N. W. 1074). But the gift is specific, if the specified things are so enumerated as to distinguish them from the residue, as by the use of such words as "together with," "as well as," and "also." 18 Am. & Eng. Enc. Law (2d Ed.), p. 716.

The testator has made specific mention of the notes, and this is relied upon by counsel to establish a specific bequest. The strength of this argument is overcome, when the testator refers to the notes as being a part of the residue of the estate. The language "con-

[1] Authorities on the validity of such a clause in a will are collected in 28 Harv. Law Rev. 336.

sisting in part of" rebuts the idea that he intended to segregate the notes from the residuum of the estate and make a specific bequest of them. It is an express declaration of his intention that they shall be a part of the residue of the estate. It will be observed that the testator does not follow his reference to the notes by a direct gift of them to her, but refers to them as a part of the residue of the estate which he has given to her. We cannot hold that clause four makes the daughter a specific as well as a residuary legatee. Our conclusion is that the notes are a part of the residue of the estate.

The judgment of the trial court is reversed, and a new trial ordered.

BROOKE, BLAIR, STONE, and OSTRANDER, JJ., concurred.[1]

MORISEY, EXECUTOR *v.* BROWN ET AL.

144 N. C. 154. 1907.

CIVIL action, heard on the pleadings before JONES, J., at November Term, 1906, of the Superior Court of Duplin County.

D. V. Morisey, on September, 9 1899, duly executed his last will and testament, in which he gave to defendant Mary P. Brown certain real estate specifically described and "one thousand dollars in money." He gave to some of the other defendants legacies and devised lands to them. To other defendants he devised land. The ninth item of the will is in the following words: "I give to my nieces, Walker and Annie Morisey, daughters of my brother James K. Morisey, the residue of my land in Sampson County." The executor brings this proceeding for the purpose of having the will construed and to ascertain whether he has the power to sell the real estate devised to pay off the pecuniary legacies, alleging that he has administered the personal estate and that the balance in his hands is insufficient for that purpose. The defendants admit the allegations in the complaint and contend that the real estate devised in the ninth item of the will is liable for the payment of the legacies. It seems to be conceded that the other devises are specific. His Honor being of the opinion that the land was not liable, rendered judgment accordingly, and defendant Mary P. Brown appealed.

CONNOR, J., after stating the case. The principles controlling the decision of this case are simple and well settled. "The real estate of the testator specifically devised is never charged with the payment of legacies, unless either the intention to charge pecuniary legacies upon it is expressly declared, or is to be necessarily implied from the context of the will or from the facts and circumstances of of the case. The presumption as between the specific devisee and

[1] Compare *Estate of Painter*, 150 Cal. 498; *Weed* v. *Hoge*, 85 Conn. 490; *Corby's Estate*, 154 Mich. 353; *Le Rougetel* v. *Mann*, 63 N. H. 472; *Martin, Petitioner*, 25 R. I. 1, 18; *Stehn* v. *Hayssen*, 124 Wis. 583.

pecuniary legatee is that the testator intends the money legally to be paid first out of the personal property and next out of the real estate which is included in the residue." 2 Underhill on Wills, 396. This is also the rule in regard to debts. *Bapt. University* v. *Borden*, 132 N. C., 476. The appellant, conceding this to be the law, insists that the devise of "all the residue of my lands in Sampson County" is a residuary devise. We do not concur in that view. If the word "residue" stood alone, the construction contended for would be correct, but it is limited by the words "in Sampson County." Item 6 of the will gives to other persons "the balance of my real estate in and around Warsaw in Duplin County." These words, in our opinion, make the devise specific as confined to the lands in "Sampson County," thus leaving undisposed of any lands the testator may have had in other counties. Whether he had land in other counties does not appear, either from the will or the pleadings. There is nothing in the will to indicate that he knew or believed that his personal estate would not be sufficient to pay the pecuniary legacies, or that he intended his land to be subjected to the payment of them. Following the well-settled rule that such intention must appear, either in express terms or by at least reasonable implication, we cannot charge the legacies upon the land. They must be paid ratably out of the balance in the hands of the executor from the proceeds of the personalty. Such being his Honor's opinion, the judgment must be *Affirmed*.[1]

McFADDEN *v.* HEFLEY.

28 S. C. 317. 1887.

MR. JUSTICE McIVER.[2] The questions raised by this appeal are as to the proper construction of the will of J. M. Hefley, deceased, a copy of which is set out in the "Case," and should be incorporated in the report of this case.

[1] Compare *Nisbett* v. *Murray*, 5 Ves. Jr. 149.

In the following cases the gift of the residue of a fund was held to abate ratably with specific shares of it. *Van Nest* v. *Van Nest*, 43 N. J. Eq. 126; *Alsop* v. *Bowers*, 76 N. C. 168; *Page* v. *Leapingwell*, 18 Ves. Jr. 463; *Wright* v. *Weston*, 26 Beav. 429; *Elwes* v. *Causton*, 30 Beav. 554; *Walpole* v. *Apthorp*, L. R. 4 Eq. 37; *Miller* v. *Huddlestone*, L. R. 6 Eq. 65. A contrary result was reached in *Petre* v. *Petre*, 14 Beav. 197; *Vivian* v. *Mortlock*, 21 Beav. 252. Compare *Cornwell* v. *Mt. Morris Church*, 73 W. Va. 96; *In re Tunno*, 45 Ch. D. 66. Many authorities on what constitutes a residuary clause are collected in 44 L. R. A. N. S. 803 note.

"The position of the respondent's counsel, that the bequest of the personal estate in this case is specific, cannot be sustained. The bequest is not specific within the meaning of any authority brought to our notice. The language is: 'I bequeath all my personal estate to my brother Selim E. Woodworth.' The language is as general in its terms as it could well be." — *Per* SAWYER, J., in *Estate of Woodworth*, 31 Cal. 595, 603. Compare *Rice* v. *Rice*, 119 N. W. (Iowa) 714; *Wilts* v. *Wilts*, 151 Iowa 149; *Henry* v. *Graham*, 9 Rich. Eq. 100; *Hawgoods' Estate*, 159 N. W. (S. D.) 117; 1 Williams, Exec. (10th ed), p. 924.

[2] Only the opinion is given.

In item 1 of the will testator devised to his wife, the defendant, Rebecca Hefley, the plantation on which he resided, with limitations over to her children. In item 2 he gives to his said wife, with like limitations over to her children, "all the horses, mules, cows, hogs, wagons, farming implements, household and kitchen furniture on said plantation." In item 3 he gives to certain of his grandchildren one hundred dollars each. Item 4 is in these words: "To my daughter, Margaret Nunnery, I give and bequeath four hundred dollars, to be invested by my executors in a homestead, the title to which is to be made to the said Margaret Nunnery and the heirs of her body." In item 5 a similar provision is made for his daughter, Mary Simpson, in substantially the same language as that made for Margaret Nunnery in the 4th item.

In item 6 the testator directs his executors not to dispose of his stock in the National Bank of Chester and the Fishing Creek Manufacturing Company, but to hold the same and pay over the dividends arising therefrom to his wife, Rebecca, during her life or widowhood, and at her death or marriage divide said dividends among his children by his said wife, Rebecca. In the next item, which is also numbered 6, the executors are directed to dispose of all other property not specifically disposed of, collect all money due, and deposit the same in bank, "and that the interest accruing thereon be used for paying expenses of schooling the children; and, further, that the said money so deposited be equally divided among the children of my wife, Rebecca, to be paid to them severally as they reach the age of twenty-one years."

The testator having made no provision for the payment of his debts, doubtless supposed that he would leave none. It turns out, however, that such is not the case, and the controversy is as to what provision shall be made for the payment of the debts and legacies. The Circuit Judge held that items 1, 4, and 5 are devises of real estate, and as such are specific, and must therefore be provided for, after payment of the debts, before any provision can be made for any of the legacies, either general or specific. He also held that "the widow is entitled to receive the dividends on the stocks bequeathed in item 6 of said will, less so much thereof as may be required to pay interest accrued since death of testator. The remainder of the debts and expenses must be paid out of the corpus of the personal property bequeathed in items 2 and 6 of said will, and leave is hereby granted to plaintiff to sell so much of the same as may suffice to pay said debts and expenses and the costs of this case. Nothing is left to satisfy the legacies of item 3 and of the second item 6."

From this judgment Rebecca Hefley and her children appeal upon the several grounds set out in the record, which raise, substantially, the following question: 1st. Whether items 4 and 5, which stand precisely on the same footing, are specific devises of

real estate, and as such entitled to priority over specific legacies. 2nd. Whether item 2 is a specific legacy. 3rd. Whether item 6 is a specific legacy. 4th. Whether the second item numbered 6 is a specific legacy.

There can be no doubt that the rule originally was that all devises of real estate are specific, and this, as stated by Mr. Jarman in his valuable work on wills, at page *587, and again at page *595, of his 1st vol., was because, prior to the statute of 1 Vict. (1838), very much like our act of 1858 (12 Stat., 700), after acquired real estate did not pass under a will. Now, as these statutes have taken away the reason of the rule, a doubt has been suggested by Judge Wardlaw in *Laurens* v. *Read* 14 Rich. Eq., 256, whether that rule still obtains, though from the authorities cited by Judge Hudson in his Circuit decree in *Moore* v. *Davidson* 22 S. C., at page 95, it would seem that in England the rule is still of force, and in this State, so far as we are informed, there has been no authoritative decision upon the subject. But as we do not regard items 4 and 5 of the will under consideration as devises of real estate, at least so far as the question raised here is concerned, we need not consider the effect of the act of 1858 upon the rule above referred to.

The ground upon which it is contended that these items are devises of real estate, is that Courts of Equity regard that as done which ought to be done, and therefore where land is directed by a will to be sold and converted into money, these courts will regard the land, even before an actual sale, as personalty, and upon the same principle where money is directed to be invested in land the provision will be regarded as a devise rather than as a bequest. But while this is a general principle upon which Courts of Equity act, it is not universally true. That is to say, that where money is directed to be laid out in land it will not, *for all purposes*, be regarded as land. In *Hinton* v. *Pinke* 1 P. Wms., 539, a money legacy was given to be laid out in land, and upon a deficiency of assets it was held that this legacy should be regarded as land, only for the amount which should remain after it had contributed its proportion towards making up the deficiency in the assets. The Lord Chancellor said: "I agree this £1,500 legacy shall be taken as land, but what the legacy is, or how much is to be laid out in land, is the question"; and it was held that the legacy must abate.

There is a very good reason for this. The whole personal property of the testator, which is the primary fund for the payment of debts, devolves upon the executor, and he is responsible to the creditors for the satisfaction of their demands, to the extent of the entire personal estate, "without regard to the testator's having by the will directed that a portion of it shall be applied to other purposes." 2 Wms. Exrs., *982. From this follows the rule that the assent of the executor, which is presumptive evidence of a sufficiency of assets, to every legacy, whether general or specific, is necessary in order to

perfect the legatee's title. Until such assent, the legal title to all of the personalty is in the executor, which he holds in trust, first to discharge the debts, and then to pay the legacies in their proper order. Now, upon the principle that where money is directed to be laid out in land, the thing given is converted into the character of that in which it is directed to be invested, it is easy to see that a testator might, by directing his entire personal property to be invested in land, strip the executor of all means of paying the debts, and thus force the creditors to pursue the land.

It seems to us, therefore, that where, as in the present case, a pecuniary legacy is given, and the same is directed to be laid out in land, while, for some purposes, such a testamentary provision may be regarded as a devise of real estate, yet it cannot be so regarded for all purposes, and that the assent of the executor is necessary to perfect the title of the legatee; and that until such assent, the legacy constitutes a part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of debts.

It will be observed, too, that in these items, 4 and 5, the thing given is a specified *sum of money*, and the executors are charged with a trust to invest such money in land. The testator does not direct his executors to purchase a certain piece of land, and give *that land* to the legatee, but he gives a specified sum of money, to be invested in land. Until the executors had made provision for the payment of all the debts, they would have no authority to divert any of the fund in their hands for that purpose — the personal estate — even though the testator may have "directed that a portion of it shall be applied to other purposes." It seems to us, therefore, that the Circuit Judge erred in holding that items 4 and 5 should, in this case, be regarded as devises of real estate.

2nd. In 2 Fonbl. Eq., 376–7, it is said, upon the authority of *Sayer* v. *Sayer*, 2 Vern., 688: "Where one devises to his wife all of personal estate at W., this is a specific legacy, and is as if he had enumerated all the particulars there." So in 2 Wms. Exrs., *849, after a statement that a "bequest of all a man's personal estate generally is not specific," it is said: "But if a man, having personal property at A. and elsewhere, bequeath all his personal estate at A. to a particular person, the legacy is specific; * * * and so is a bequest of all the testator's goods and chattels in a particular county." In *Pell* v. *Ball* Speer Eq., at page 84, it is said (italics ours): "Whether a legacy is specific or not, must necessarily depend upon the nature of the thing referred to and described in the will. If the thing be capable of individuality, as a ring or picture, or if it be an assemblage of things, as a library or cabinet, or something capable of being separated by sensible distinctions, *as the property on a particular estate;* in all such cases the descriptions in the will set forth with distinctness the subject of bequest and make it specific.

* * * It may be safely affirmed, I think, that whether a bequest couched in general terms is specific or otherwise, depends on this: if the things falling within the terms, when enumerated (or if they had been enumerated by the testator), are in their nature specific, then the legacy is specific; otherwise it is not." This language of Johnston, chancellor, is referred to with approval by Dunkin, chancellor, in his Circuit decree in *Godard* v. *Wagner* 2 Strob. Eq., at page 9, which, upon this point, was adopted by the Court of Appeals. See also, *Brown* v. *James*, 3 Strob. Eq., 24. Indeed, in *Warley* v. *Warley*, Bail. Eq., 397, Harper, chancellor, goes so far as to say that "A bequest of the testator's whole personal estate, or of the residue after specific legacies out of it, is to be regarded as specific," though the subsequent case of *Henry* v. *Graham* 9 Rich. Eq., 100 seems to be inconsistent with that view.

Under these authorities, we hold that the bequest in the second item of the will must be regarded as specific. The things falling within the terms of this bequest are in their nature specific, and susceptible of being enumerated and specifically designated. It is a bequest of personal property *on a particular estate*, and, as such, capable of being singled out and specifically delivered.

Our next inquiry is as to the character of the bequest in item 6. It will be observed that the stocks therein referred to are not directly and expressly disposed of, or given to any one, but only the dividends thereon. There can be no doubt, under the authorities above cited, that if these stocks, and not merely the dividends arising therefrom, had been directly and expressly given to the beneficiaries therein designated, the bequest would have been specific. But "where the interest or produce of a fund is bequeathed to a legatee, or in trust for him, *without any limitation as to continuance*, the principal will be regarded as bequeathed also. Thus an indefinite gift of the dividends gives the absolute property of the stocks." 2 Wms. Exrs., *864; *Philipps* v. *Chamberlaine*, 4 Ves., 51; *Page* v. *Leapingwell*, 18 Id., 463; *Adamson* v. *Armitage*, 19 Id., 418; *Earl* v. *Grim*, 1 Johns. Ch., 494. Here the bequest of the dividends was without limitation as to continuance, and there being nothing in the will to show that the testator intended to make any other disposition of the stocks themselves, under the rule stated they passed with the dividends, and, as we have said, the bequest must be regarded as specific.

The next question is whether the bequest mentioned in the second item numbered 6 can be regarded as specific. We see nothing in the terms of this item, or in the character of the property there disposed of, which would invest it with the character of a specific bequest. It is couched in the most general terms, and the property referred to is not specifically designated.

Item 1 is clearly a specific devise of real estate, and cannot, therefore, be abated until, first, the general legacies and then the specific

legacies are exhausted. *Warley* v. *Warley, supra.* It was argued, on behalf of appellants, that there is no priority as between specific devises and specific legacies, but that when abatement becomes necessary, they must abate *pro rata.* While, under the view which we take, this may not become a question of any interest to the appellants, yet, to avoid misconception, we desire to say that we do not concur in that proposition. The rule is otherwise. See *Hall* v. *Hull,* 3 Rich. Eq., 65, recognized in *Farmer* v. *Spell,* 11 Rich. Eq., at page 549.[1]

The judgment of this court is, that the judgment of the Circuit Court be modified in accordance with the views herein announced, and that the case be remanded to that court for such further proceedings as may be necessary.

COLLINS *v.* LEWIS.

L. R. 8 Eq. 708. 1869.

JAMES DEW, who died in 1864, by will, made in 1861, gave certain pecuniary legacies, and then devised to the use of his wife for her life all his real estate, situate at Woodlands, in the parish of St. Briavels, Gloucestershire, and after her death he gave the same to his trustees, with all the residue of his real and personal estates, upon trust for his niece for life, with remainder for her children.

[1] That specific legacies are to be sacrificed for debts before specific devises, see *M'Campbell* v. *M'Campbell,* 5 Litt. 92; *Gordon* v. *James,* 86 Miss. 719, 755; *Rogers* v. *Rogers,* 1 Paige 188; *Edmunds* v. *Scott,* 78 Va. 720. That specific legacies and devises abate ratably, see *Maybury* v. *Grady,* 67 Ala. 147; *Danel* v. *Arnold,* 201 Ill. 570; *Farnum* v. *Bascom,* 122 Mass. 282; *Appeal of Cryder,* 11 Pa. 72; *Long* v. *Short,* 1 P. Wms. 403; *Tombs* v. *Roch,* 2 Coll. 490; *Gervis* v. *Gervis,* 14 Sim. 654. Compare *In re Saunders-Davies,* 34 Ch. D. 482.

"It has been contended, that under the first clause of this will, 'First I will and direct, that all my legal debts, legacies, and funeral expences, shall be fully paid, &c.' where the testator has charged his real estate by will duly attested, both debts and legacies shall take place of every other disposition; and that the legacies shall stand in the same place as debts; even to the disappointment of the devisees; and that there is no reason, why they should not have the same preference. The principle however is perfectly different; the one being purely voluntary, the other obligatory. Wherever a man makes a will, he is supposed to do that, which conscience obliges him to do: and if he shews an intention, that his debts shall take place of every other disposition, and that he meant they should be paid, the Court will strictly enforce that intention. The same principle will not apply to legacies, which have been attempted to be put upon the same footing: but it does not follow, that where a testator says, 'In the first place I will, that all my debts and legacies shall be paid;' and then gives certain legacies; and at the latter end of it repeats these words, that such legacies as well as his debts shall be a charge upon the realty; and that because the latter must have a preference, the former shall also have it. The estate so contended to be charged is specifically devised; and I cannot see any reason, why pecuniary legacies should have any preference to such specific devises. If I was to direct these legacies to be so raised and paid, it would be giving them that undue preference." — *Per* SIR RICHARD PEPPER ARDEN, M. R., in *Kightley* v. *Kightley,* 2 Ves. Jr. 328, 330.

The executors renounced probate, and the niece, who was the testator's heiress-at-law, became legal personal representative, and finding insufficient personalty to pay the testator's debts, but considerable real estate, she filed this bill for an administration of the trusts. The question was, whether the legacies were payable out of the realty, the pecuniary legatees contending that the legacies were charged upon the real estate in case the personalty should prove insufficient to satisfy them.

It now appeared that the personal estate amounted to the sum of £483 10*s.* 2*d.*, and the debts of the testator to the sum of £2,063 6*s.* 8*d.*

The legatees had been served with notice of this hearing on further consideration, but did not appear.

SIR JOHN STUART, V. C. Upon principle as well as upon authority it is the settled law of the court that the personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to. A pecuniary legatee has no right whatever to call upon a residuary devisee to contribute to the payment of debts.

The decision in the case of *Hensman* v. *Fryer* is clearly a mistaken decision;[1] I must therefore decline to follow it. The declaration will be, that these legatees have no right to resort to the real estate for payment of their legacies.[2]

HAYS ET AL., EXECUTORS *v.* JACKSON ET AL.

6 Mass. 149. 1809.

THE petitioners alleged, and proved by the requisite documents from the probate office, that the personal estate of the testator was insufficient, by the sum of 66,000 dollars, for the payment of his just debts and legacies, and thereupon prayed that they might be licensed to convey so much of the real estate, of which he died seised, as should be sufficient to pay these debts and legacies, with the charges of sale.

Upon notice ordered, the heirs at law appeared, and sundry questions arose, all of which are discussed in the following opinion of the court, which was delivered by

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following dispositions of his estate: —

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also he gives to his sister Susanna Gray, in fee, cer-

[1] See Gray, The Nature and Sources of the Law, Sec. 464.

[2] *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109, *accord.*

tain specific real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan, in fee, *all the remaining* part of his estate, real and personal, of which he might die seised, or which might afterwards descend to him, by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

And he appoints Judah Hays and Elisha Sigourney, his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law, are before us.

The testator was seised of other real estate than that specifically devised to Mrs. Gray, when he made his will; and he afterwards acquired other real estate, which, on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate, left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorized, on this petition, to marshal the assets, and if we are, in what manner they are to be marshalled, are the questions before the court.

The case may at first be considered as at common law, and according to the equitable rules established for marshalling assets, where there is a will.

At common law, the lands of a testator are not assets, in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator in devising his lands without charging them with the payment of his debts, the Statute of 3 & 4 W. & M. c. 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that Statute, all the lands of the testator, whether they descend or are devised, are charged by law with the payment of creditors by specialty, who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors by specialty, who have been paid out of the personal estate. These rights of the creditors remain uncontrolled by any provisions which a testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid, by which regulations they will be bound.

And the general rule in equity for marshalling assets is thus settled: (1) The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. (2) The real estate which is appropriated in the will as a fund for the payment. (3) The descended estate, whether the testator was seised of it when the will was made, or it was afterwards acquired. (4) The rents and profits of it, received by the heir after the testator's death. And, (5) The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.

The laws of this Commonwealth, applicable to this subject, may next be considered. And here all the personal estate of the testator, and all the real estate, of which he died seised, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty. Also by the Statute of 1783, c. 24, § 10, all estate, real or personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it, *ex officio*, as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, *according to the will*, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevised personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will, in trust, — first, to pay the debts, and then the legacies; and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the Statute above cited removed all doubt; and the executor is now, in all cases, trustee of the undisposed residue for the next of kin.

As to the distribution of undevised lands, this section is merely affirmative of the common law, which gives to the heir all undevised

estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts; and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision, applicable to this subject, in the 18th section of this Statute, where it is enacted, that whenever a testator in his will shall give any chattels or real estate to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees, or heirs shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our Statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest that the testator may bind, by his dispositions, his legatees, devisees, and heirs.

Hence result the right and duty of the court, in the due exercise of its jurisdiction, so to marshal the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect rights of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law, has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specific devise, and thus drive the specific devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshalled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate, personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts, in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specific bequest of any chattel, and no exemption of any part of the personal estate from the payment of debts. Therefore the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the Government (if any), is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specific devise, not liable, by the terms of it, to

any deduction. The descended estate must then be applied to the payment of the debts, before the specific devise can be resorted to. And the same rule must apply to the lands which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specific within the intention of the rule.

Jackson first provides that his debts and funeral charges be paid. He next bequeaths legacies to his nephews and nieces, and makes a specific devise to his sister, Susanna Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, "when my debts and funeral charges, and the legacies, are paid, and the specific devise to my sister is deducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot therefore consider this devise of the remainder as specific. It is rather creating a fund for the payment of the debts and legacies, with a devise of what remains, if any, to the residuary devisee. If, after the personal estate was exhausted by the debts, the unsatisfied creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the Statute, because a general residuary legatee cannot have contribution if nothing remains. For in that case nothing is, given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given; and if, after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being, in fact, no object on which it could operate.

Thus, when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief; but the money secured is considered as a deduction from the property devised. But the case of *King* v. *King et Al.*, 3 P. Wms. 358, is in point. There the testator, being seised of freehold lands, and of a copyhold, which last he had mortgaged, devised the copyhold to his nephew; and *after all his debts were paid*, he devised the rest of his estate, real and personal, to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then, and then only, he should be entitled to the residue. We cannot, therefore, consider this residuary devise to Mrs. Swan as specific, within the rule of marshalling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case it ought not to

apply, because in the residuary devise the testator gives, not only all his real and personal estate, of which he was then seised and possessed, but all of which he might afterwards die seised; and, therefore, that he contemplated after-acquired estate, which, although it could not pass by his will, yet was evidently intended to pass; and that this intent ought to be so far executed as to cause it to be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator cannot, in his will, charge with the payment of his debts after-purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law cannot affect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises; for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seised or possessed. We think, therefore, that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows:

Ordered that the said executors be, and they hereby are empowered and licensed to raise the sum of by sale at public auction of the houses, lands, or tenements, of which the said Henry Jackson died seised in fee, being devised by him by his last will and testament; excepting such part thereof as is therein devised in trust for his sister, Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for, any other person or persons; the said sum, when raised, to be applied to the payment of the debts aforesaid, with the incidental charges of sale; and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at public auction of so much of the real estate of which the said Jackson died seised, not having devised the same in and by his last will and testament, such further sum of money, as with the money raised by the sale first above ordered, will amount, in the whole, to the said sum of to be applied as aforesaid, giving bond, etc.[1]

[1] But see *Manning* v. *Spooner*, 3 Ves. Jr. 114.

"It seems by the English authorities, that residuary devises have been regarded as specific on the ground that a testator could dispose only of the lands owned by him when his will was made, and therefore that a residuary devise was a gift of such lands only; and that the lands devised were subject to the rule of marshalling assets, which leaves specific devises untouched, if the general legacies and devises are sufficient, with the other property, to pay the testator's debts. 2 Jarman on Wills, 547. It may well be doubted whether this rule of the English law was ever adopted in this Commonwealth. For though Parsons, C. J., seems to have recognized it, incidentally, in *Wyman* v. *Brigden*, 4 Mass. 151, cited by the plaintiff's counsel, yet in the subsequent case of *Hays* v. *Jackson*, 6 Mass. 149, he held that a residuary devise, like that which

LANCEFIELD *v.* IGGULDEN.

L. R. 10 Ch. App. 136. 1874.

THIS was an appeal from a decision of VICE-CHANCELLOR BACON, Law Rep. 17 Eq. 556.

George Lancefield, by his will, dated the 24th of November, 1864, devised all his freehold and leasehold hereditaments to the defendants in trust for his mother, Elizabeth Lancefield, during her life; and he declared that, subject and without prejudice to the life interest of his mother, the trustees should stand possessed of certain freehold hereditaments at Boughton-under-Blean and in Canterbury upon the trusts therein declared for the benefit of his sister, Ann Corbett, her husband and children; and of certain other hereditaments in Canterbury upon the trusts therein declared for the benefit of his sister, Mary Brockwell, her husband and children; and of certain other hereditaments in Canterbury upon the trusts therein declared, for the benefit of his sister, Elizabeth Reynolds, her husband and children; and of certain other hereditaments in Canterbury upon like trusts for the benefit of his niece, Mary Jane Olifent, her husband and children; and of certain other hereditaments in Canterbury in trust for his nephew, the plaintiff, for his life, and after his death for his children; and of certain hereditaments at Wingmore in trust for the plaintiff, his heirs and assigns, forever; and of certain other hereditaments in Canterbury upon the trusts therein stated for the benefit of his niece, Selina Lancefield, her husband and children. And the testator declared that, subject to the life estate of his mother, his trustees should stand possesssed of the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments, in trust for his sister, Eliza Lancefield, her heirs, administrators, and assigns; and as to all the residue of his personal estates and effects not thereinbefore disposed of, subject to the payment thereout of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto Eliza Lancefield absolutely.

was made to the present plaintiff, could not be considered as specific, within the rule of marshalling assets. And the court, upon a petition for license to sell real estate for the payment of a testator's debts, ordered the estate, given to the residuary devisee to be sold, before selling that which was specifically devised.

"But we are of opinion, that since the Rev. Sts. c. 62, § 3 ('Any estate, right or interest in lands, acquired by the testator, after the making of his will, shall pass thereby in like manner, as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will, to have been the intention of the testator'), have enabled testators to devise lands acquired after the making of their wills, by clearly manifesting, by their wills, their intention so to do, the English rule above mentioned, if it ever was in force here, can exist no longer." — *Per* METCALF, J., in *Blaney* v. *Blaney*, 1 Cush. 107, 116.

As to liability of a lapsed legacy or devise for payment of claims against the estate, see 3 Am. & Eng. Ann. Cas. 719, note.

The testator died on the 17th of February, 1868, and his mother died in April, 1870.

The plaintiff, besides being a specific devisee under the will, claimed to be a creditor of the testator for £400, and filed the present bill against the trustees for the administration of the real and personal estate of the testator.

The plaintiff's claim as a creditor was disallowed by the Chief Clerk, and a balance was found due from him of £62 6*s.* 4*d.*; and the personal estate having been found insufficient for payment of the testator's debts, two questions were argued when the cause came on for further consideration, first, whether specifically devised estates were liable to contribute rateably with the residuary real estate to meet the deficiency of the personal estate; and, secondly, how the costs of the plaintiff's claim as a creditor, which had failed, ought to be borne.

The Vice-Chancellor, Law Rep. 17 Eq. 556, held that the specifically devised estates were not liable to contribute till the real estate comprised in the residuary devise had been exhausted, and directed that the plaintiff should pay his own costs of his claim as creditor, but should not pay any of the costs of the other parties. From this decision the defendants appealed.

Lord Cairns, L. C.[1] Independently of the state of the law before the Wills Act, independently of the Wills Act, and independently of the construction of this particular will, I should have thought that in all cases there would have been a very strong presumption of an intention on the part of the testator of this kind: that if a man bequeaths a specific portion of personalty to one person and the residue to another person; and if he devises Whiteacre to one person and Blackacre to another, and the residue of his real estate to a third, a different conclusion would be arrived at as to his intention with respect to the payment of his debts in the second case to that which would be arrived at in the first case; because it appears to me that, from the well-known habits of mankind, as every one expects to owe some debts at his death, and expects that his personal estate will be the primary fund for payment of his debts, a man who gives a specific legacy to one person and the residue to another may well suppose that the usual rule of law will apply, and that his debts will be paid out of the residue; but that as to the real estate, there being little expectation that the real estate would be resorted to for payment of debts, a man who devises Blackacre to one person and Whiteacre to another, and the residue to a third, may well be supposed to do so under the belief that he was not only benefiting the specific devisees to the extent of the estates devised to them, but also the residuary devisee to the extent of the residue given to him. But when I look at this particular will, there appear

[1] Part of the opinion is omitted as well as the concurring opinion of Sir W. M. James, L. J.

to me well-marked reasons for supposing that this view is in accordance with the testator's intention. For the testator having three sisters married and one unmarried, he portions out his real estate among them by giving specific devises to the married sisters and their families, and the residuary real estate to the unmarried sister, and then gives the residue of his personal estate, after payment thereout of his funeral and testamentary expenses and debts, to the same sister. It is impossible not to see that whether the rule of law was present to the testator's mind or not, he anticipated that the residue of the personalty would be the fund out of which the debts would be paid. So far, therefore, as this particular will is concerned, there is nothing to lead us to the conclusion that the residuary real estate was intended to be liable to the debts in preference to the specifically devised estates.

Then as to the question of law. Before the Wills Act the rule of law was as well settled as any rule of the Court, that a residuary devise of real estate was treated as specific, and although the items were not specified, it was considered quite as much specific as if they had been specified. The result of this general rule of law was, that after-acquired real estate would not pass under a general devise. Then the Wills Act stepped in. It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments. The Legislature had to deal with the question of a will passing after-acquired property, and it has dealt with it by the 24th section. That section enacts that "every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The effect of that is, as Lord Westbury on one occasion expressed it, that the Legislature attributed to the will a continuing operation as if the devise were repeated every moment until the testator's death; so that as to all the property it must be taken as if he made it the moment before his death. If we realize this hypothesis of the Legislature, the result is that this residuary devise must be taken as having been made the moment before the testator's death, but as a devise specific in its nature. There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises.[1] . . .

[1] But see *Sutton's Estate*, 97 Atl. (Del.) 624. In the following States by statute residuary realty is sacrificed before land specifically devised, and in some of them before specific legacies. Idaho, Rev. Codes (1908), § 5529; Indiana, Annot. Stats.

GREVILLE, Appellant *v.* BROWNE, Respondent.

7 H. L. C. 689. 1859.

This was an appeal against a decision of the Lord Chancellor and Lord Justice Blackburne, sitting as Commissioners of Appeal from the judgment of the Encumbered Estates Court.

John Browne, of Galway, had one son, Michael J. Browne, and two daughters, Maria (Lady Ffrench) and the respondent. By his

(1914), § 3125; Kansas, Gen. Stats. (1908), § 9835; Maine, Rev. Stats. (1903), c. 76, § 7; Massachusetts, Rev. Laws (1902), c. 135, § 27; *Cooney* v. *Whitaker*, 192 Mass. 596; New Hampshire, Pub. Stats. (1901), c. 196, § 13; Ohio, Annot. Code (1912), § 10584. But see Kentucky, Stats. (1915), § 2076.

"The order in which the different funds or subjects of property constituting the estate of a deceased testator, and which are liable to the payment of debts, will be applied, seems to be pretty clearly settled by the various adjudications that have been made upon the subject. The first to be so applied, is the personal estate at large not exempted by the terms of the will or necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for the payment of debts. Next, real estate descended to the heir. After it, property, real or personal, expressly charged with payment of debts, and then subject to such charge, specifically devised and bequeathed. If these prove inadequate, the general pecuniary legacies, and after them, specific legacies, both classes ratably; and in the last resort, real estate devised by the will." — *Per* Lee, J., in *Elliott* v. *Carter*, 9 Gratt. 541, 548–549.

"The executor or administrator must apply to the satisfaction of the debts of a dead man the property which may be available, but in the following order:

1. Personalty not specifically bequeathed, retaining a fund sufficient to meet any pecuniary legacies.

2. Realty specifically appropriated for, or devised in trust for (and not merely charged with) payment of debts.

3. Realty that descends to the heir.

4. Realty charged with the payment of debts.

5. Fund (if any) retained to pay general pecuniary legacies.

6. Realty devised whether specifically or by general description and personalty specifically bequeathed *pro rata* and *pari passu*.

7. Property which did not belong to the dead man, but which is appointed by his will in exercise of any general power of appointment.

Doubt was occasioned by the case of *In re Bate*, 43 Ch. D. 600, as to which ought to go first, realty charged with the payment of debts or a pecuniary legacy. Kay, J. held that the pecuniary legacy must go first, but, *semble* wrongly, and in the later cases of *In re Salt*, 1895, 2 Ch. 203, and *In re Roberts*, 1902, 2 Ch. 834, it was decided that where a will contains a general direction for payment of debts the pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate." — Maitland, Equity, pp. 207–208.

Compare *Kelley* v. *Richardson*, 100 Ala. 584, 596; *Sloan's Estate*, 152 Pac. (Cal.) 540; *Ex parte Chadwin*, 3 Swanst. 380; 1 Jarman, Wills (5th Am. ed.), *p. 622.

In the following States by statute devisees and legatees contribute proportionately to reimburse a devisee or legatee whose interest has already been taken for creditors. Arkansas, Stats. (1904), § 8060; California, Code Civ. Proc. (1915), § 1564; Connecticut, Gen. Stats. (1902), § 308; Florida, Comp. Laws (1914), § 2432; Idaho, Rev. Codes (1908), § 5531; Indiana, Annot. Stats. (1914), § 3124 (devisees only, *semble*); Kansas, Gen. Stats. (1908), § 9834; Kentucky, Stats. (1915), § 2073 (devisees only, *semble*); Maine, Rev. Stats. (1903), c. 76, § 6; Massachusetts, Rev. Laws (1902), c. 135, § 26; Nebraska, Rev. Stats. (1913), § 1412; Nevada, Rev. Laws (1912), § 6009; Ohio, Annot. Code (1912), § 10583; Utah, Comp. Laws (1907), § 2805; Vermont, Pub. Stats. (1906), § 2890; Washington Annot. Codes & Stats. (1910), § 1336.

will (which contained many interlineations), dated 20th January, 1825, he bequeathed to his wife an annuity of £100 in addition to what she was entitled to under her marriage settlement, "the same to be in lieu and satisfaction of any dower or thirds she may be entitled to out of my real estates, or any other property I may die possessed of," with the usual power of distress. Then followed a bequest of the household furniture to his wife; then a sum of £1,000 in trust, to give such part of it as she might think fit to his daughter Anne on her marriage with her mother's consent, "to bear no interest till then; the entire (whole) or the remainder of the said sum of £1,000 to go and be considered as part of the residue of any property as hereafter bequeathed to my first object on earth, my best of sons, Michael Joseph Browne. I further bequeath to my dear and very dear daughter Anne Browne, in addition to any part of the above-recited sum of £1,000, a further or additional sum of £5,000 sterling, including the property already settled on her by my marriage articles; and also the value of the property made over for her use before, all payable on her marriage with the consent of her mother, the interest thereof, at five per cent, to be regularly paid till then. But should my said daughter Anne Browne die before her marriage, then my will is that this bequest shall be considered as part of the residue of my property, and go and merge in same." To his daughter Lady Ffrench (to whom he had given as a portion £10,000) and to her husband and children, and to his own sister Julia he left £5 apiece, and concluded thus: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give, and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any manner he may think proper," and he appointed his son his sole executor. By a codicil he appointed John Kirwan his executor in case his son should not wish to act as one of the executors.

The testator died in 1825, and the son having declined to act as executor, the will was proved by Kirwan.

Michael Joseph Browne, the son, entered into possession of them estates, and paid the interest on the legacy of £5,000 to his sister down to 1842. On the 1st September, 1846, he mortgaged the estates to the appellant and other persons. On the 29th May, 1852, a petition for sale was presented in the Encumbered Estates Court, and an absolute order for sale was made on the 8th September, 1852. On the 4th December, 1855, the estates were sold for a sum of £69,410, a sum not sufficient to pay off the mortgages and interest then due.

On the settling of the final schedule on the 15th December, 1856, MR. COMMISSIONER LONGFIELD held, that the respondent, Anne

Browne, was entitled to be paid the legacies bequeathed to her by the will of her father in priority to the mortgagees. The full court confirmed this decision, and on appeal to the LORD CHANCELLOR and LORD JUSTICE BLACKBURNE in the Court of Appeal, it was again affirmed. The present appeal was then brought.

THE LORD CHANCELLOR. (LORD CAMPBELL.)[1] My Lords, in this case I am of opinion that the decision of MR. COMMISSIONER LONGFIELD and MR. COMMISSIONER HARGRAVE, confirmed by the LORD CHANCELLOR of Ireland and the LORD JUSTICE OF APPEAL in Ireland, is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well-settled and useful rules of property which have prevailed for a century and a half.

My Lords, the first question is, whether these legacies are a charge upon the real estate. If it were *res integra*, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I might allow that there is great force in the very able and ingenious argument we have had from the bar. It might then be contended that the testator had no notion whatever of charging the land with these legacies; but we find that from the time of Lord Macclesfield and Lord Cowper, down to the time of Lord Cottenham and Vice-Chancellor Page Wood, a rule has prevailed upon this subject which has been acted upon uniformly by all judges except Lord Alvanley, a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception by all the judges that have determined such cases. For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift. That seems to me to be the view which was taken in the cases before Lord Cowper and Lord Macclesfield. The language in which it is expressed varies from time to time, but still that rule seems to have been uniformly acted upon, and I would say, in the language used by Vice-Chancellor Page Wood, in the last case upon the subject, *Wheeler* v. *Howell* [3 K. & J. 198], that in the present case "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

I therefore conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that as a general rule which must be acted upon, that the testator, in using this lan-

[1] Opinions of LORD BROUGHAM, LORD CRANWORTH, LORD WENSLEYDALE, and LORD KINGSDOWN are omitted.

guage in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. Here the testator gives the legacies generally, and then he says: "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can." It is quite clear, that here there is first a general gift of legacies, and then there is a disposition of the rest, residue, and remainder of his property, real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge. Twenty-one years after the death of the testator, his son mortgaged the land for £50,000; and it is allowed that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume, that after he had thus charged the land with the legacies, unless there is some special power in the will enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burden that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage; they merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says: "I hereby devise, bequeath, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of same in any way he may think proper." We are now considering whether these lands have been discharged of the legacies: we must consider that they are charged with them. Then he, having thus charged the land, did he mean by those words to give his eldest son the power of disposing of the land at any time, so that the younger children would be deprived of the security which he had before provided for them? I think that no such meaning can be educed from the language he employs, and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this appeal should be dismissed, and the decree affirmed.

Orders appealed from, affirmed. Appeal dismissed, with costs.[1]

[1] See *In re Balls*, [1909] 1 Ch. 791.

Greville v. *Browne* has generally been followed in this country. *Lewis* v. *Darling*,

MASTERS *v.* MASTERS.[1]

1 P. Wms. 421. 1718.

Mrs. Mary Masters by her will left several legacies to several of her relations and others; for instance, to her nieces A. B. and C. pecuniary legacies: (viz.) to A. and B. £200 apiece, and to her niece C. £400, and having a mother living, gave all her household goods, after her mother's death, to be divided among her said three nieces, and also the best of her clothes; she likewise by her will gave several specific legacies, and to the poor of two hospitals in Canterbury (naming them) £5 apiece; as to her lands she devised them to her nephew and heir-at-law, the defendant Sir Harcourt Masters, *but charged the same with the payment of her legacies above-mentioned*, and made the defendant Sir Harcourt executor.

Afterwards her mother died, by which a considerable increase of personal estate came to her, and thereupon she made a codicil, thereby giving several pecuniary legacies to several to whom she had before given legacies by her will, many of which legacies were larger than what were given them by her will. . . .

Her codicil happened not to be attested by any witness, and so as was admitted, could charge no land.

It was also admitted, that both her real and personal estate were deficient in value to pay the legacies and annuities given by her will and codicil.

The defendant Sir Harcourt proved her will and codicil, and upon a bill brought for the payment of several of the legacies to several of the plaintiffs,

First, it was decreed by the Master of the Rolls [Sir Joseph Jekyll], that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid.

16 How. 1, 10. Many authorities are collected in 40 Cyc. 2024-2028. The leading case to the contrary is *Lupton* v. *Lupton*, 2 Johns. Ch. 614, a decision by Chancellor Kent, which still seems to be the law of New York. *Morris* v. *Sickly*, 133 N. Y. 456. But the New York court has often attempted to distinguish it. *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 351; *Hoyt* v. *Hoyt*, 85 N. Y. 142; *Scott* v. *Stebbins*, 91 N. Y. 605; *Briggs* v. *Carroll*, 117 N. Y. 288. And, although it has been held in New York that in general extrinsic circumstances are not admissible to prove a charge of legacies on realty where the will is silent, *Fries* v. *Osborn*, 190 N. Y. 35, such evidence has been admitted to establish a charge where the provisions of the will were similar to those in *Lupton* v. *Lupton*. *McCorn* v. *McCorn*, 100 N. Y. 511. Compare *Brill* v. *Wright*, 112 N. Y. 129; *Irwin* v. *Teller*, 188 N. Y. 25. *Lupton* v. *Lupton* has been followed in Connecticut. *Gridley* v. *Andrews*, 8 Conn. 1. And in Maryland. *White* v. *Kauffman*, 66 Md. 89.

Under the rule of *Greville* v. *Browne*, the realty is only to be resorted to if the personalty is insufficient. *In re Boards*, [1895] 1 Ch. 499. Compare *In re Spencer Cooper*, [1908] 1 Ch. 130.

[1] Only the part of the case relating to marshalling is given.

And therefore, that the legatees in the will should be paid out of the real estate, and if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate; and, there being admitted to be a deficiency, that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion; on the contrary that the charities, though preferred by the civil law, yet they ought to abate in proportion, for they were but legacies. . . .

GELBACH *v.* SHIVELY AND OTHERS.

67 Md. 498. 1887.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before ALVEY, C. J., STONE, MILLER, ROBINSON, and BRYAN, J.

ALVEY, C. J., delivered the opinion of the Court.

This case was brought to obtain a judicial construction of the will of George Gelbach, Jr., deceased, and to have determined the rights of certain parties thereunder. George Gelbach, the testator, died in Feb. 1880, leaving a widow and two children, and four grandchildren, all provided for in his will, which was duly admitted to probate. The father of George Gelbach, Jr., had died in 1879, leaving three children, including George, as his only heirs and distributees, and he left a small estate, consisting of real and personal property in Pennsylvania, where he died, and some real property in the City of Baltimore.

George Gelbach, Jr., by his will, after giving some few legacies, made the two following bequests:

"Item. I give and bequeath out of the portion or share of my father's estate that may come to me, one thousand dollars to my brother, Joseph Gelbach."

"Item. I give and bequeath (out of the share or portion of my father's estate that may come to me) one thousand dollars to my sister, Elizabeth Shively."

He then devised and bequeathed all the rest and remainder of his estate, real and personal, to be divided into three equal parts, one of which parts he gave to his wife absolutely, and the other two-thirds he gave to his two children in equal parts, in trust for life, with remainder to their children.

The estate of the father of the testator was settled after the death of George, and the proceeds of that estate, both real and personal (with the exception of some railroad stock, distributed in the lifetime of George), were distributed, and the portion thereof distrib-

uted as George's share was paid over in equal parts to Joseph Gelbach and Elizabeth Shively, on account of the legacies to them under their brother's will. The amounts received, however, from the estate of the father, was not equal to the amount mentioned in the bequests to them by the brother; and they now claim that the balance of such amounts shall be made up from the general personal estates of George, the testator. And whether such claim can be maintained, depends upon the nature and distinctive character of the bequests — whether they are so far of a specific character as to be *exclusively* dependent for their payment upon the sufficiency of the estate or fund referred to as the source of payment, and *out of which* the amounts were given, or whether they are of the character denominated *demonstrative* legacies?

Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a *demonstrative* legacy; and such legacy is so far general, and differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan* v. *Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate *with general* legacies, upon a deficiency of assets, except to the extent that it is to be treated as a general legacy, after the application of the fund designated for its payment. *Mullins* v. *Smith*, 1 Drew. & Sm. 204; 2 Wm's Ex'rs, 995.

The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or as one dependent *exclusively* upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. *Creed* v. *Creed*, 11 Cl. & Finl. 509. For although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be charged upon a particular fund or estate exclusively. As was said by the Lord Chancellor, in *Saville* v. *Blacket*, 1 P. Wms. 779, "it is possible for a legacy to be charged in such manner upon a certain fund, as that upon its failing, the legacy shall be lost."

Here, the bequest is of a $1000 out of the testator's share or portion of his father's estate. Does this amount to anything more than a testamentary assignment or relinquishment of the testator's interest in his father's estate, to the extent of the legacies mentioned, in favor of his brother and sister, if his interest should prove to be of that amount? The language of the bequests would seem clearly to negative the idea that the testator intended that any portion of these legacies should be paid out of his general personal estate (apart from that acquired from his father); and he mani-

festly supposed that his share in his father's estate would be sufficient to pay the amounts mentioned by him. The amount necessary to pay the balance of these legacies, if they are to be paid out of the general personal estate of the testator, would have to be raised out of the portions given to the testator's wife and children; and we are clearly of opinion that such result would contravene the intention of the testator, as manifested in the general scheme of the will, and by the terms of the bequests themselves.

It is certainly true, as a general proposition, as was said by the Vice-Chancellor in *Dicken* v. *Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a *separate and independent intention* that the money shall be paid to the legatee *at all events*, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. But where the legacy is so specific and so connected with the fund appointed for its pay ment as to give rise to the inference that the legacy would not have been given but for the fund as a means of payment, there the legacy will fail with the failure of the fund. *Mann* v. *Copland*, 2 Madd. 223, 226; *Dicken* v. *Edwards*, 4 Hare, 276; *Creed* v. *Creed*, 11 Cl. & Fin. 509. See, also, *Hancox* v. *Abbey*, 11 Ves. 179.

In our opinion it is clear, that the legacies given to the brother and sister are not general legacies in the sense that they are, to any extent, payable out of the general personal estate of the testator, apart from the fund out of which they were made payable; and that, to the extent of the deficiency of that fund to pay such legacies in full, they must fail.

It follows that the decree of the 28th of March, 1887, requiring the balance supposed to be due on the two legacies mentioned to be paid out of the general assets of the estate, must be reversed, and the cause be remanded.

Decree reversed, and cause remanded.[1]

DAVENHILL *v.* FLETCHER.

Ambl. 244. 1754.

WILLIAM FLETCHER, by will 17th December, 1752, devises an annuity of £100 a year to his wife for life, to be paid out of his freehold estate at Stamford-Hill; and also the use of his house there,

[1] A demonstrative legacy is so far specific that it will not abate with general legacies upon a deficiency of assets. *Dugan* v. *Hollins*, 11 Md. 41, 77; *Matthews* v. *Targarona*, 104 Md. 442, 450–453 (*semble*); *O'Day* v. *O'Day*, 193 Mo. 62; *Armstrong's Appeal* 63 Pa. 312; *Myers* v. *Myers*, 88 Va. 131; *Acton* v. *Acton*, 1 Meriv. 178. Compare *Mullins* v. *Smith*, 1 Dr. & Sm. 204. But, if the fund out of which the legacy is payable fails, the legatee ranks with general legatees as to the unsatisfied remainder. *Dunn* v. *Renick*, 40 W. Va. 349; *Mullins* v. *Smith*, *ante* (*semble*). As between each other demonstrative legacies abate *pro rata*. *Apple* v. *Apple*, 66 Cal. 432.

together with all the furniture and linen: he also gave her £500 which, together with the aforesaid annuity of £100 he declared to be in full of what she should or might claim for her dower, or thirds, out of the real or personal estate. There was a deficiency of assets to pay debts and legacies.

Q. If the £500 given to the wife should abate in proportion with the other legacies?

This cause came on the 12th, and stood over to this day, the 18th, to look into the case of *Burridge* v. *Braddyl*, 1 Wms. 127, and *Blower* v. *Murret*, 11th July, 1752.[1]

Sir Thomas Clarke, Master of the Rolls: Two arguments used why the £500 should abate:

1st, The words *in full of dower*, etc., were inserted, not to give the wife an advantage, but to signify she should not have the legacies and dower too: and as the £500 would abate without those words, so it ought now even with them.

2d, That the legacies are more than her dower, and therefore the £500 ought to abate.

His Honour observed, there was some weight in the observations, which would deserve consideration if it was *res integra*. But there were two authorities strong against them. In *Burridge* v. *Braddyl*, the wife was directed to release; which, though it imported an act to be done, yet was not more than such a declaration; for by acceptance of the legacy, she is barred, and the heir at-law has a right to a release.

Blower v. *Murret* is yet stronger, as being in the words used in the present case; and there the Court directed the Master to inquire whether she was intitled to *any* dower; and if she was, declared she should have the legacy without abatement.

Therefore decree, etc.[2]

[1] 2 Ves. Sr. 419.

[2] The decree declared "that as to the legacy of £500 given to the said E. Fletcher, she was to be considered as a purchaser, and not liable to abatement." — Rep.

A legacy in lieu of dower has priority over general legacies. *Steele* v. *Steele*, 64 Ala. 438; *Security Co.* v. *Bryant*, 52 Conn. 311; *Warren* v. *Morris*, 4 Del. Ch. 289; *Tevis* v. *McCreary*, 3 Met. (Ky.) 151 (but see *Chambers* v. *Davis*, 15 B. Mon. 522); *Moore* v. *Alden*, 80 Me. 301; *Pollard* v. *Pollard*, 1 Allen 490; *Towle* v. *Swasey*, 106 Mass. 100; *Borden* v. *Jenks*, 140 Mass. 562; *Currie* v. *Murphy*, 35 Miss. 473; *Ellis* v. *Aldrich*, 70 N. H. 219; *Howard* v. *Francis*, 30 N. J. Eq. 444, *post*, p. 755; *Plum* v. *Smith*, 70 N. J. Eq. 602; *Potter* v. *Brown*, 11 R. I. 232; *Stuart* v. *Caron*, 1 Desaus. 500; *Overton* v. *Lea*, 108 Tenn. 505. *Mitchener* v. *Atkinson*, Phil. Eq. 23, *contra*. Compare *Farnam* v. *Bascom*, 122 Mass. 282; *In re Wedmore*, [1907] 2 Ch. 277. And over specific legacies. *Steele* v. *Steele*, 64 Ala. 438; *Borden* v. *Jenks*, 140 Mass. 562; *Loocock* v. *Clarkson*, 1 Desaus 471. But in order that the rule apply the wife must have a right to dower. *Moore* v. *Alden*, 80 Me. 301 (*semble*); *Acey* v. *Simpson*, 5 Beav. 35; *Roper* v. *Roper*, 3 Ch. D. 714.

REYNOLDS, EXECUTOR *v.* REYNOLDS ET AL.

27 R. I. 520. 1906.

BILL IN EQUITY brought to obtain the opinion and instruction of the court.

PARKHURST, J.[1] . . . In answer to the third question, we are of the opinion that the $5,000 legacy given to Abby F. Reynolds under the second clause of the codicil should be paid in full in preference to the other general legacies.

It is in testimony that the legatee, for many years prior to the death of the testator, had rendered many services as housekeeper and nurse to the testator, for which she had received no fixed compensation and for which the testator agreed to provide by his will, and that this legacy was accordingly made by him "to be in full payment and discharge of claims of every kind she may have against my estate." It also appears that she had never presented any claim against the estate, but had elected to accept this provision in lieu thereof.

It is the settled rule of law that in such cases the legatee stands in a position analogous to a purchaser of value, and is entitled to a preference over volunteers, or legatees receiving only a bounty without prior pecuniary consideration; and in case of deficiency such a legatee is entitled to be paid in full as against ordinary general legatees, whose legacies shall abate if necessary. *Appeal of University of Pennsylvania*, 97 Pa. St. 187–200; *Wood* v. *Vandenburgh*, 6 Paige, 277–286; *Duncan* v. *Franklin Township*, 43 N. J. Eq. 143, 145; *Tevis' Ex'rs.* v. *McCreary*, 3 Metc. (60 Ky.) 151; *Buchanan* v. *Pue*, 6 Gill, 112; *Gassman's Est.*, 14 Phila. 308; 2 Woerner, Admx., 985, Sec. 452; 2 Red. Wills, 452; *Towle* v. *Swasey*, 106 Mass. 105; *Clayton* v. *Akin*, 38 Ga. 320; *Security Co.* v. *Bryant*, 52 Conn. 311; *Farnum* v. *Bascom*, 122 Mass. 288; *McLean* v. *Robertson*, 126 Mass. 538.

The case will be remanded to the Superior Court for the county of Washington, with instructions to enter its decree in accordance herewith.[2]

[1] Only part of the opinion is given.

[2] A legacy in satisfaction of a debt has priority over general legacies. *Matthews* v. *Targarona*, 104 Md. 442, 444–449 (*semble*); *McLean* v. *Robertson*, 126 Mass. 537; *Duncan* v. *Franklin Township*, 43 N. J. Eq. 143 (*semble*); *Wood* v. *Vandenburgh*, 6 Paige 277, 286; *Williamson* v. *Naylor*, 3 Y. & C. Exch. 208. *In re Wedmore*, [1907] 2 Ch. 277, *contra*. Compare *Estate of Thayer*, 142 Cal. 453 (statute); *In re Whitehead*, [1913] 2 Ch. 56.

A legacy to an executor for his care and trouble has no priority. *Clayton* v. *Akin*, 38 Ga. 320; *Fetwell* v. *Stacy*, 2 Vern. 434; *Heron* v. *Heron*, 2 Atk. 171. But see *Harper's Appeal*, 111 Pa. 243.

On exoneration in general of the personalty by the realty, see *Reid* v. *Corrigan*, 143 Ill. 402; *Lee, Appellant*, 18 Pick. 285; *Henry* v. *Barrett*, 6 Allen 500; *Frampton* v. *Blume*, 129 Mass. 152; *Brant* v. *Brant*, 40 Mo. 266, 279; *Clery's Appeal*, 35 Pa. 54;

ONEAL *v.* MEAD.

1 P. Wms. 693. 1721.

One seised of a real estate in fee, which he had mortgaged for £500, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife.

The question was, whether there being (as usual) a covenant to pay the mortgage moneys, the leasehold premises devised to the wife should be liable to discharge the mortgage?

Obj. The personal estate is the natural fund for debts, and according to the decree made by his Honor in *Sir Peter Soame's Case*, where the father the mortgagor dying intestate, and leaving a mortgage upon his real estate made by himself, the personal estate was applied to pay off the mortgage, whereby the younger children were left destitute: so by the same reason, in this case, the leasehold, though specifically devised to the wife, yet being personal estate, must be liable to pay the debt due by the mortgage; especially in favor of the heir, who otherwise would be very slenderly provided for, and in a worse condition than his younger brothers.

But the Master of the Rolls [Sir Joseph Jekyll], after taking time to consider of it, and being attended with precedents, decreed that as the testator had charged his real estate by this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised must take them *cum onere*, as probably they were intended. That by such construction each devise would take effect, (viz.) the leasehold estate go to the devisee thereof, and the heir enjoy the freehold, though subject to the burden with which the testator in his lifetime had charged it; and this resolution did not in the least interfere with that of *Clifton and Burt*, 1 P. Wms. 678, because in the latter there was no mortgage.[1]

Pinckney v. *Pinckney*, 2 Rich. Eq. 218; *Inchiquin* v. *French*, 1 Cox Ch. 1; *Watson* v. *Brickwood*, 9 Ves. Jr. 447; *Bootle* v. *Blundell*, 1 Meriv. 193; *Kilford* v. *Blaney*, 29 Ch. D. 145.

[1] *Thomas* v. *Thomas*, 17 N. J. Eq. 356; *Ruston* v. *Ruston*, 2 Yeates 54, *accord.* See *Halliwell* v. *Tanner*, 1 Russ. & Myl. 633.

A devisee of land which the testator has mortgaged is not entitled to exoneration out of land specifically devised. *Estate of Porter*, 138 Cal. 618; *Mason's Estate*, 4 Pa. 497; *Atkinson* v. *Staigg*, 13 R. I. 725; *Fraiser* v. *Littleton*, 100 Va. 9. Nor out of a residuary devise. *Higbie* v. *Morris*, 53 N. J. Eq. 173.

SERLE *v.* ST. ELOY.

2 P. Wms. 386. 1726.

One seised in fee of lands near Godalmin in Surrey, that were in mortgage, and likewise seised in fee of other lands, devised his lands in Godalmin in his cousin and god-daughter Jane Styles at her age of twenty-one, *subject to the encumbrances that were thereupon*, and ordered that the rents and profits of the premises should, during the infancy of his said god-daughter, be paid to her father for her sole use, and devised other lands to trustees, in trust to pay the testator's debts.

Obj. The lands in Godalmin are devised *subject to the encumbrances thereupon*, for which reason the devisee must take them *cum onere*, and be contented to pay off the mortgage.

Master of the Rolls [Sir Joseph Jekyll] *contra.* The devise of the estate subject to the encumbrance is no more than what is implied, for the testator could not do it otherwise; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage of Godalmin is part of those debts which are to be paid off out of the money arising by sale of the trust-estate; and this is the stronger, by the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father for the sole use of the infant, which is as much as to say, that they shall not go or be applied in discharge of the mortgage.

And though the infant by her own bill had submitted to pay off this mortgage, yet his Honor said, he must take care of the infant, and not to suffer her to be caught by any mistake of her agent.

Wherefore paying the costs of the day, let the infant amend her bill.[1]

BROWN, Executor *v.* BARON, Appellant.

162 Mass. 56. 1894.

Morton, J.[2] The appellant objects to the payments made by the executor on account of the mortgage on the Moody Street property, and also insists that the rents of the Bridge Street estate do not belong to the executor as residuary legatee, but belong to the heirs at law, or to the estate.

[1] See *Turner* v. *Laird*, 68 Conn. 198; *Hale* v. *Cox*, 3 Bro. C. C. 322; *Waring* v. *Ward*, 5 Ves. Jr. 670; *Middleton* v. *Middleton*, 15 Beav. 450; 2 Jarm. Wills (5th Am. ed.), *p. 1445.

"A devisee of land which the testator has mortgaged is entitled to exoneration out of land descended to the heir. *Galton* v. *Hancock*, 2 Atk. 424 (1742); *Wride* v. *Clark*, 2 Bro. C. C. 261 n." 4 Gray, Cas. on Prop. (2d ed.), p. 621. See *Wilts* v. *Wilts*, 151 Iowa 149.

[2] The statement of facts and part of the opinion are omitted.

By the eighteenth clause of the will of Mary Merriam Abbott, the Moody Street property was specifically devised to John B. Brown, the executor. At the time of the death of the testatrix it was subject to a mortgage which had been given by the testatrix and her sister to the Mechanics' Savings Bank of Lowell to secure a note given to it for money borrowed by them. There is nothing in the will indicating an intention on the part of the testatrix that the devisee should pay the mortgage, or that any different course should be pursued in the payment of that debt from that pursued in the payment of her other debts. There is a provision that certain legacies shall abate in case of a deficiency, which would imply that the devise and legacy to the executor are not to be diminished. And we see nothing to take the case out of the well-settled rule in this Commonwealth, that the devisee of specific real estate is entitled, in the absence of a contrary intention on the part of the testator, to have it exonerated from a mortgage placed upon it by the testator, even though the personal estate is insufficient to pay general legacies. *Hawes* v. *Dehon*, 3 Gray, 205. *Plimpton* v. *Fuller*, 11 Allen, 139. *Towle* v. *Swasey*, 106 Mass. 100. *Farnum* v. *Bascom*, 122 Mass. 282. *Richardson* v. *Hall*, 124 Mass. 228. *Morse* v. *Bassett*, 132 Mass. 502. *Creesy* v. *Willis*, 159 Mass. 249. . . .

Decree affirmed.[1]

TWEDDELL *v.* TWEDDELL.

2 Bro. C. C. 101. 1786.

THIS bill was filed by Francis Tweddell, devisee for life of an estate called High Laws, under the will of John Aynesley his grandfather, and John Tweddell eldest son of Francis, against the personal representatives and next of kin of John Aynesley, praying, amongst other things, to have the personal estate of John Aynesley aforesaid, applied in discharge of a mortgage subsisting upon the High Laws estate. And the case made by the bill was as follows:

That by indentures of lease and release, by way of mortgage, dated the 9th and 10th of February, 1737, the release being made between John Aynesley of the first part, William Aynesley of the second part, and Edward Delaval of the third part, in consideration of £1,776 therein mentioned, to be paid to John Aynesley, for the proper debt of William Aynesley, and £224 therein mentioned, to be paid to William Aynesley by the said Edward Delaval, making together £2,000, the said John Aynesley, with the approbation of William Aynesley, bargained and sold the estate called High Laws, etc., to hold to the said Edward Delaval in fee, subject to a proviso for redemption on payment of £2,000 and interest.

[1] But compare *Hedger* v. *Judy*, 95 Ky. 557; *Ruston* v. *Ruston*, 2 Yeates 54; *Lutkins* v. *Leigh*, Cas. Temp. Talb. 53. See *Johnson* v. *Child*, 4 Hare 87.

That John Aynesley afterwards agreed to purchase the estate of William Aynesley, and thereupon, by indentures of lease and release, of the 29th and 30th of April, 1747, made between William Aynesley of the one part, and John Aynesley of the other part, reciting the mortgage of Delaval, and also reciting, that the said John Aynesley, by articles of agreement entered into between him and the said William Aynesley, had contracted with the said William Aynesley for the absolute purchase of the inheritance of the said premises, and had agreed to pay the sum of £3,500 for the same, in manner therein mentioned; (that is to say) to Francis Blake Delaval (son and heir-at-law of Edward Delaval) all such sums of money as should be due to him, for principal and interest, upon the said mortgage, on the first of May then next; as also to pay, or secure to be paid, to the said William Aynesley, all such sums of money as should remain of the said £3,500 after deducting the money due to Delaval; and also reciting, that, upon the first of May then next, there would be due from the said estate, to the said Francis Blake Delaval, the sum of £2,155 subject and liable to the payment whereof the said John Aynesley was to take the said premises, and which sum being deducted from the £3,500 there would remain in the hands of John Aynesley £1,345 to be paid by the said John Aynesley to the said William Aynesley, on the conveyance being made. It was witnessed, that the said William Aynesley, in consideration of the performance of the said articles on his part, and of the said sum of £1,345 to him paid, or secured to be paid, by the said John Aynesley, did grant, etc., to the said John Aynesley, his heirs and assigns forever, all the said premises, etc., and the common covenants were therein contained, and, in the convenant against encumbrances, the mortgage and securities made to the said Edward Delaval for the £2,000 and interest, were excepted; and the said John Aynesley did thereby, for himself, his heirs, executors, and administrators, covenant and agree with the said William Aynesley, his heirs, executors, and administrators, that he the said John Aynesley, his heirs, executors, and administrators, should well and truly pay, or cause to be paid, to the said Francis Blake Delaval, his heirs, executors, administrators, and assigns, the said sum of £2,155 in manner aforesaid, and would at all times thereafter indemnify the said William Aynesley, his heirs, executors, and administrators, and his and their goods and chattels, lands, and tenements, from all costs and charges, etc., in respect of the said mortgage to Edward Delaval.

That John Aynesley, by his will, dated 5th January, 1748, devised the said premises (together with the other real estates), but subject nevertheless to the payment of all his just debts and legacies, to John Reid, his heirs and assigns, forever, to the use of his first son John Aynesley for life, and, after the determination of that estate, to trustees to preserve contingent remainders, but subject nevertheless, after payment of his just debts and legacies, but not sooner, to

permit and suffer the said John Aynesley to receive the rents and profits during his life, and, after his death, to the first and other sons of John Aynesley the son, in tail-male; remainder to the issue-female of John Aynesley the son, as tenants in common; remainder to the testator's two daughters, Mary and Anne, during their lives, as tenants in common; remainder to plaintiff Francis Tweddell (son of testator's daughter Mary) for life; remainder to trustees to preserve, etc.; remainder to the first and other sons of Francis Tweddell in tail-male, with other remainders over; and, after giving some legacies, the testator did thereby charge and make liable the rents and profits of all his real estates, to the payment of all his just debts and legacies; and, after reciting that his estate of High Laws was then in mortgage to Francis Blake Delaval for £2,000, he the said testator did thereby direct and give full power and authority to his trustee John Reid, his heirs and assigns, to take and receive the rents and profits of all his said real estates, as well for the payment to the said Francis Blake Delaval of the debt of £2,000 and the interest thereof, as all his the said testator's other just debts and legacies, and outgoings, in such order and manner as his said trustee should think proper. But the testator made no disposition of the residue of his personal estate.

As to so much of the said bill, as prayed that any part of the personal estate of John Aynesley, the testator, might be applied in payment of the mortgage for £2,000 and interest upon the estate at High Laws, the defendant, John Tweddell, demurred; for that the said plaintiffs have not shown any title to have such personal estate so applied.

This demurrer was argued the 31st July, 1784, when the Lord Chancellor thought it ought to be overruled; but, upon application of defendant's counsel, it was set down to be reargued; and it was reargued the 17th and 20th December, 1784; and two questions were made. First, whether from the nature of the contract, the personal estate of John Aynesley was liable to be applied in discharge of the mortgage. Secondly, if it were not so from the nature of the contract, whether John Aynesley had made it liable to be so applied by his will.

The Lord Chancellor directed this cause to stand for judgment the second day of Hilary Term; but, his Lordship's illness intervening, he did not give judgment to this day.

Lord Chancellor Thurlow. This comes before me on a demurrer, and the question is, whether the personal estate shall be applied for the benefit of the heir, in discharge of a mortgaged debt upon real estate. It arises upon the following case (stating the case). The point is, whether the personal estate shall be exempted or not from the payment of this charge. It is a clear rule that the personal estate is never charged in equity, where it is not at law, and, if not chargeable at law, there is no principle, or case, in this court to

warrant its being chargeable in equity, contrary to the order of the law. There is no case expressly decided, upon the subject upon which I am now to give my opinion. However, the grounds, upon which former cases have been decided, apply to the present: particularly that case, where a grandfather bought an estate charged with a mortgage, and it descended to the father; and the father, having occasion to borrow money, charged the estate with that sum, entering into a covenant, charging himself, at law, with the payment. This transaction, certainly, changes the nature of the debt, and makes it his own. This principle I think applicable to the present point. *Cope* v. *Cope*, 2 Salk. 449, was the first case cited at the law. There is another case in 2 Wms. 659, *Evelyn* v. *Evelyn*. The principle is more expressly laid down in that case. The land was the original debtor, and the mortgagee could not bring his action against the executor, or any other party, but merely against the original debtor. As to the case in 1 Chancery Cases, 74, nothing more is to be gathered from thence, than the general rule: *Cornish* v. *Mew*, Ch. Ca. 271; *Pockley* v. *Pockley*, 1 Vern. 36, show, that where a purchaser of an equity of redemption dies, the personal estate shall not be applied for the benefit of the heir, it not being the ancestor's debt.

Where it is a debt payable by executors, at law, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims, 1 Wms. 347; 2 Wms. 664; 1 Vesey, 312. In respect of the rule of marshalling assets, it is, that it must be a debt affecting both the real and personal estate; so, in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove the executors are accountable at law, and not in equity. There is a case abridged in 6 Brown's Cases in Parlt. 520, *Lord Rochford* v. *Belvidere* (which his Lordship stated). I cannot distinguish that case from this; the House of Lords were of a different opinion to what I entertain upon this case, and therefore I have stated it more at length. The personal estate never was liable, and the party never was liable to an action upon covenant. In that case George had a fee-simple in the estate; he was capable of giving it after the charges were extinguished; however, it was held, contrary to my opinion, that the personal estate was liable. As to the present case, let the demurrer be allowed; as my opinion is that the personal estate never was liable, either by action against the party himself, or against his executors.

Demurrer allowed.[1]

[1] Affirmed on rehearing. 2 Bro. C. C. 152.

See *Evelyn* v. *Evelyn*, 2 P. Wms. 659; *Lacam* v. *Mertins*, 1 Ves. Sr. 312; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454.

The law of England in regard to the exoneration of mortgaged property has been changed by statute. Stat. 17 & 18 Vict., c. 113 (1854); Stat. 30 & 31 Vict., c. 69 (1867); Stat. 40 & 41 Vict., c. 34 (1877).

SCOTT *v.* BEECHER AND WIFE.

5 Mad. 96. 1820.

JOHN TYSON being entitled to a copyhold estate to him and his heirs, according to the custom of the manor, mortgaged the same on the 9th October, 1811, to Richard Mills, to secure £1,000 and afterwards surrendered the same to Mills and his heirs pursuant to the covenant in the mortgage deed. Tyson also gave his bond to Mills for payment of the money advanced. The mortgage money was not paid at the appointed time.

Tyson died in November, 1814, and by his will, 14th December, 1813, devised all his estate and effects to his wife, Elizabeth Tyson, and in particular his copyhold estate, and appointed her executrix; and she proved the will, and was admitted to the copyhold, subject to the mortgage; she died in May, 1816, without issue, leaving her brother, the plaintiff, heir at law, according to the custom of the manor.

In February, 1819, letters of administration of the unadministered estate of John Tyson were granted to the plaintiff and the defendant Frances Beecher, the wife of the other defendant Alexander Beecher, and upon the death of Elizabeth Tyson, letters of administration of her estate, were also granted to the plaintiff and the said Frances Beecher.

Richard Mills, the mortgagee, threatened to proceed to recover by ejectment the mortgaged premises, whereupon the plaintiff filed the present bill, insisting that he ought to have the mortgage paid out of the personal estate of the mortgagor, he having left assets more than sufficient for that purpose, and the prayer of the bill was accordingly.

The defendants by their answer admitted that the assets of James Tyson were more than sufficient for the payment of his funeral expenses and debts, including the mortgage debt and interest thereon, and that E. Tyson had in her life-time possessed assets of James Tyson more than sufficient to pay all debts, including the mortgage, and that at her death there was also outstanding of James Tyson sufficient to pay the mortgage; but they submitted, that under the circumstances, the plaintiff must take the copyhold estate, subject to and chargeable with the mortgage debt, and that he was not entitled to have the personal estate applied in discharge of the mortgage.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] Elizabeth Tyson was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted that she possessed assets sufficient to pay all the debts, including the mortgage, and it may therefore

be said that she elected to continue the mortgage as a charge on her real estate. But I apprehend this is not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of James Tyson became her personal estate, but the mortgage debt of James Tyson was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate.

The bill was dismissed with costs.[1]

HOFF'S APPEAL.

24 Pa. 200. 1855.

WOODWARD, J.[2] The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut Street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for $8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the Court of Common Pleas refused to allow them a credit for it on the ground that the widow took the estate *cum onere*, and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

The will contains, in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the executors should pay the debts before distribution be made of the estate in pursuance of the will. A debt secured by a mortgage of the testator's own making is no less a debt within the meaning of the introductory phraseology of wills than a promissory note; and executors are as much bound to pay the one as the other. The reason assigned in the English cases for throwing such a mortgage upon the personalty, is that the personal estate has been benefited by the making of the mortgage; a reason for which we stand in no need, though it is as applicable here as there. As to the mortgagee, the mortgage is a specific lien, and he cannot be restrained from resorting to the land pledged; and as between him and other creditors, he will often be compelled to do so in relief of other funds; but as between the mortgagor and his

[1] See *Keene* v. *Munn*, 16 N. J. Eq. 398; *Ilchester* v. *Carnarvon*, 1 Beav. 209; *Clarendon* v. *Barham*, 1 Y. & C.C.C. 688; *Bruce* v. *Morice*, 2 De G. & Sm. 389; *Swainson* v. *Swainson*, 6 De G. M. & G. 648. But compare *Bond* v. *England*, 2 K. & J. 44.

[2] Only the opinion is given.

representatives, his mortgage is evidence of indebtedness; and where there is nothing in the will to control their action, it is their plain duty to pay it. And to excuse them there must be a clear declaration of intention that the devisee of the mortgaged premises is to take them *cum onere*. Thus it is settled, says Powell, on the authority of a great number of cases (see his work on Devises, vol. 11, page 671), that a devise of mortgaged lands, subject to the mortgage thereon, does not throw the charge on the estate so as to exempt the funds which by law are antecedently liable, as the testator is considered to use the terms merely as descriptive of the encumbered situation of the property, and not for the purpose of subjecting his devisee to the burden.

But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate *cum onere*, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage debt. *Shafto* v. *Shafto*, 2 Cox's P. W. 664; *Woods* v. *Huntingford*, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for $13,900; that he paid $5,500, which, with this mortgage of Elmes to Harvey of $8,400, was "in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said mortgage

and the interest due, and to grow due, thereon are to be paid by the said John Hoff.

Now, it is immaterial whether this amounted to a *covenant* on the part of Hoff to pay the mortgage, though, according to the doctrine of *Campbell* v. *Shrum*, 3 Watts, 60, and the cases there cited, it might be easy to say it did, but surely there can be no doubt he would be liable to an action for money had and received, at the suit of the mortgagee. As was said in the case of the *Earl of Belvidere* v. *Rochfort*, cited in 2 Powell on Devises, 679, the plain intent of the deed was to put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon that contract, have compelled him to pay it off. The decree in that case was confirmed by the House of Lords, and though some doubt has been thrown upon it by Lord Thurlow in *Tweddell* v. *Tweddell*, 2 B. C. C. 107, and by Lord Alvanley, in *Woods* v. *Huntingford;* still, its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting *Billinghurst* v. *Walker*, 2 B. C. C. 608; *Cope* v. *Cope*, 2 Salk. 449, 2 Ch. Ca. 5; *Pochley* v. *Pochley*, 1 Vern. 36; *King* v. *King*, 3 P. W. 360; *Galton* v. *Hancock*, 2 Atk. 436; *Robinson* v. *Gee*, 1 Vesey, 251; *Phillips* v. *Phillips*, 2 Bro. C. 273; *Johnson* v. *Milkrop*, 2 Vern. 112; *Balsh* v. *Hyam*, 3 P. W. 455.

If then Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in *assumpsit* if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so — for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled, that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed: *Neal* v. *Mead*, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies: *Lutkins* v. *Leigh*, Cases in Time of Talbot, 3; *Hamilton* v. *Morely*, 2 Vesey, Jr. 65. In *Ruston* v. *Ruston*, 2 D. 243, s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof; — *aliter* of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be a residuum, though not of sufficient amount to pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage.[1]

PETITION OF HUNT, Administrator.

19 R. I. 139. 1895.

Case stated for an opinion of the court under the Judiciary Act, c. 20, § 24.

June 29, 1895. Matteson, C. J. This is a case stated for the opinion of the court. Rowland L. Rose died intestate September 19, 1894, seized and possessed of a parcel of land on the southwest corner of Bridgham and Greenwich streets in Providence, particularly described in the petition. This parcel of land was formerly owned by Dexter N. Knight who mortgaged it to the Mechanics Saving Bank to secure the payment of his note for $25,000, dated January 23, 1869. On February 13 following, Knight conveyed the equity of redemption in the mortgaged property to Gorham Thurber who assumed the payment of the mortgage and guaranteed the pay-

[1] *Mount* v. *Van Ness*, 33 N. J. Eq. 262, *contra*.

ment of the mortgage note by a guaranty written on its back. The trustees of the estate of Thurber conveyed the property to Rose, subject to the mortgage by deed dated May 11, 1889. The consideration named in this deed was $10,000, which was the sum paid by Rose for the equity of redemption. He also assumed the payment of the mortgage by a clause in the deed to him as follows: "Said premises are subject to a mortgage of twenty-five thousand dollars ($25,000) to the Mechanics Saving Bank payment of which is assumed by the grantee." On July 22, 1889, the Mechanics Savings Bank transferred the mortgage to the Citizens Savings Bank. Rose thereupon as a consideration for the transfer signed an agreement on the back of the note as follows: "Waiving demand, notice and protest, I hereby guarantee the full payment of the within note; future payments of principal or of interest in renewal thereof not releasing me as indorser." The interest on the note has been paid to January 23, 1895. The administrator, widow and heirs at law of the deceased have concurred in stating the foregoing facts to obtain the opinion of the court on the question whether the heirs are entitled to have the mortgage paid out of the personal estate in exoneration of the real, or whether the real estate descended to them subject to the incumbrance of the mortgage.

The general rule as between the real and personal representatives is that the personalty is the primary fund for the payment of debts: and this rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased. *Gould* v. *Winthrop*, 5 R. I. 321; *Atkinson* v. *Staigg*, 13 R. I. 725; 2 Williams on Executors, 1042. The rule extends, however, only to incumbrances created by the deceased himself; if the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt and on his death passes to his devisee or heir at law subject to the incumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt. *Gould* v. *Winthrop*, 5 R. I. 321. The question, then, resolves itself into this: Did the deceased, purchasing the equity of redemption, by assuming the payment of the mortgage debt in the manner stated, or by guaranteeing the payment of the note on the transfer of the mortgage from the Mechanics Savings Bank to the Citizens Savings Bank, make the mortgage debt, as between his real and personal representatives, his personal debt?

The assumption of the mortgage by Rose was equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt. *Mount* v. *Van Ness*, 33 N. J. Eq. 262, 265. Entering into covenants like these, it is held, does not sufficiently show an intention on the part of the purchaser to transfer the debt from the estate to himself, as between his heir and executor or administrator, to have that effect. *Evelyn* v. *Evelyn*, 2 P. Wms. 664; *Tweddell* v. *Tweddell*, 2 Bro. Ch. 101,

152; *Woods* v. *Huntingford*, 3 Ves. 128; *Butler* v. *Butler*, 5 Ves. 534; *Waring* v. *Ward*, 7 Ves. 332; *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 417; *Barham* v. *Earl of Thanet*, 3 Myl. & K. 607; *Duke of Cumberland* v. *Codrington*, 3 Johns. Ch. 228; *Keyzey's Case*, 9 Serg. & R. 71, 73; *Mount* v. *Van Ness*, 33 N. J. Eq. 262. And the rule is the same even though the purchaser has rendered himself liable at law to the mortgagee for the payment of the mortgage debt. *Duke of Cumberland* v. *Codrington*, 3 Johns. Ch. 229.

Nor was the guaranty on the back of the note by Rose sufficient to manifest an intention on his part to make the debt his own in such wise as to change the natural course of assets. It was merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remained after the guaranty precisely as before.

To have the effect of transferring the debt from the estate on which it is charged to the personal estate, the dealing between the purchaser and the mortgagee must go to the length of changing the terms of the original contract so as virtually to constitute a new contract; as for instance, arranging for different times or modes of payment, or for an additional loan with a new mortgage including the old as well as the new loan, etc. *Billinghurst* v. *Walker*, 2 Bro. Ch. 603; *Woods* v. *Huntingford*, 3 Ves. 128; *Waring* v. *Ward*, 7 Ves. 332; *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 417; *Barham* v. *Earl of Thanet*, 3 Mylne & K. 607; *Creesy* v. *Willis*, 159 Mass. 249; 2 Jarman on Wills, 1449.

We are, therefore, of the opinion, 1, that the estate described in the petition descended to the heirs at law of Rowland L. Rose charged with the burden of the mortgage for $25,000; 2, that he did not by assuming payment of the mortgage nor by guaranteeing payment of the mortgage note charge his administrator with the payment of the mortgage debt; 3, that the administrator will not be justified in paying the mortgage debt out of the personal estate which may come to his hands.[1]

[1] See *Creesy* v. *Willis*, 159 Mass. 249; *Campbell* v. *Campbell*, 30 N. J. Eq. 415; *Cumberland* v. *Codrington*, 3 Johns. Ch. 229.

The law in regard to the exoneration of mortgaged property has been affected by statute in Massachusetts. Acts (1909), c. 198. And in New York. Consolidated Laws (1909), Real Property Law, § 250. See Indiana, Annot. Stats. (1914), § 3129; Louisiana, Rev. Civ. Code (1913), Arts. 1440–1443.

SECTION VII.

TIME OF PAYMENT OF LEGACIES.

PEARSON *v.* PEARSON, LYNCH AND OTHERS.

1 Sch. & L. 10 (Ireland). 1802.

THE bill was filed by the executor of Matthew Pearson, to have the trusts of his will carried into execution under the direction of the court.

By this will several pecuniary legacies were bequeathed with directions that they should be paid within a week after the death of the testator, or in failure thereof that they should bear interest from that time. There followed other legacies to Mrs. Vickers, and to ——— Vickers her son, which were given generally without assigning any time for payment, and the residuum was bequeathed, one half to be divided by the executor between the sons and daughters, grandsons and granddaughters of testator's cousins Roger and Henry Pearson, share and share alike; and the other moiety to his said executor for his own use, subject to make good the other demands created by the will.

The testator died possessed of a considerable personal estate, consisting chiefly of bank stock and Government debentures. One question which arose upon the will was, whether the legacies to Mrs. Vickers and her son bore interest, the personal estate being a productive fund.

LORD CHANCELLOR [REDESDALE].[1] As to the reason given for the rule mentioned in *Maxwell* v. *Wettenhall*, that the legacy is payable out of a fund which is yielding profits, I take it that makes no difference. In case of a legacy charged upon lands, the land yields profit: but that is not the reason that in such case the legacy bears interest immediately. The rule with respect to legacies out of personal estate is taken from the practice in the ecclesiastical courts, where a year is given to the executor to collect the effects, and he cannot be called upon to pay before that time, because he cannot know until then what fund there is to pay; in conformity to this, courts of equity have proceeded, in the case of legacies out of personal estates. But in the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator or not at all.

Nothing can be more settled than that a man's saying, "I direct all my stock to be applied to the payment of legacies," will not make those legacies bear interest one moment sooner than they otherwise would: whether the fund bears interest or not is totally

[1] A part of the case is omitted.

immaterial in the case of pecuniary legacies; I remember a case of *Greening* v. *Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after testator's death, and the court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months all the intermediate profits belonged to the residuary legatee. The executor may pay the legacy within the twelve months,[1] but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.[2] . . .

HOWARD AND OTHERS, EXECUTORS, *v.* FRANCIS AND OTHERS.

30 N. J. Eq. 444. 1879.

BILL for construction of will and directions. On bill, answers and consent of counsel.

THE CHANCELLOR. — Ebenezer Francis, late of the city of Newark, deceased, by his will, after directing payment of his debts and funeral expenses, gave and devised to his wife, Mary Ann, during her widowhood, the house No. 302 Washington street, in Newark, where he, at the date of the will (July 27, 1876), resided, with remainder in fee, on her death or remarriage, to his daughter Mary McLean, and providing that, if his daughter Mary McLean should predecease his wife during the widowhood of the latter, the property should go to the latter in fee. He then gave all his personal estate, except such as belonged to his business firm, to his wife as her absolute property. He then gave to his executors $10,000, to be held by them in trust for his wife and his daughter Mary McLean, the income thereof to be paid to his wife during her life, and that of his daughter Mary McLean, for their support and maintenance; on the death or remarriage of his wife, in the life-time of his daughter Mary McLean, the principal sum and any unexpended income remaining in the hands of the executors, to be paid over to his daughter Mary McLean, if then of full age, but if not, then the executors to continue to hold

[1] *Sullivan* v. *Winthrop*, 1 Sumner 1, *accord*. See *Angerstein* v. *Martin*, T. & R. 232, 241.

[2] Many cases to the same effect may be found in 6 Am. & Eng. Ann. Cas. 525. As to the rate of interest, see *Welch* v. *Adams*, 152 Mass. 74, 88, 89; *Loring* v. *Mass. Horticultural Society*, 171 Mass. 401.

the principal sum in trust for her until she should attain to her majority, they to expend so much of the income for her support as might be necessary, and on her attaining to her majority to pay over to her the principal sum, with any of the income thereof remaining in their hands; but if she should die during the widowhood of his wife, then the principal sum and any income thereof remaining at her death in the hands of the executors, to be paid over by them to his wife. He then gave to his executors $10,000, to be held by them in trust for his daughter Emma and her two children, the income to be paid to her in half-yearly payments, for the support and maintenance of her and her children during her life, and provided that, on her death, the principal sum and any unexpended income in the hands of the executors be paid in equal shares to her children, if then of age, and both survive their mother, but if only one of them survives the mother, the whole to go to that one; and if the children, or either of them, should then be under age, the executors to continue to hold the principal sum, if both are under age, or the share of the one under age, if only one be under age, and receive the income, expending so much as necessary for support of such minor children or child, and pay over the principal sum, with the unexpended income in their hands, to the children or child, on their or his or her attaining to full age. He further provided, that if his daughter survive both children the principal sum and unexpended income in the hands of the executors go to his daughter Emma, and if her husband survive her and her children the principal and unexpended income to go to him. He then gave to his executors $5,000 on a similar trust, for his son Ebenezer and his (the son's) wife and child. And he gave the residue of his estate in augmentation of the several sums so given in trust for his wife and his daughter Mary Ann, his daughter Emma and her children and husband, and his son Ebenezer and his wife and child. He then declared that neither the house in Washington street, nor the personal property given to his wife, was in any case to be subject to or charged with the payment or discharge of the legacies before given, or his debts; and that the provision in his will for his wife was in lieu of her dower in his estate. He then gave his executors power to sell and convey his real estate, and authorized and empowered them to use their own discretion in the settling up and adjusting of his interest in and in connection with his partnership business, both as to time and manner, having in view the welfare of the estate, and the good of those who, under the provisions of his will, he desired should receive the benefit of the results of his long-continued business life.

The testator died July 27, 1876. He left but little personal estate, except that which belonged to his copartnership, and no real estate, except the house in Washington street, devised to his wife, and his interest in his factory premises, which is a large and valuable property in Newark. Out of the personal estate received

from the copartnership the executors have paid his funeral expenses, certain expenses of the administration, and his debts and taxes upon his real estate; and they have also made payments therefrom for the support and maintenance of the widow and her minor child, the testator's daughter, Mary McLean. They have in hand, including money invested (some $8,000), about $11,783.34. They will realize no more from the estate until they sell the factory premises, for which, owing to the depressed condition of the real estate market, it is impossible now to find a purchaser at an adequate price, or to sell it without very great sacrifice. In the amount received by them from the partnership business there was included some interest money. They have received some rent from the factory property (there are some small dwelling-houses on it besides the factory buildings), and will probably continue to receive rents from it. There is a mortgage of $5,000 upon those premises, the interest of which must be provided for, as well as insurance upon the buildings and taxes, and the costs of superintending and taking care of the property, a large part of which is not occupied.

The executors ask instructions as to their duty in the following respects: Whether, under the circumstances, they should first invest the legacy of $10,000, given to the widow, and whether the investments already made should be held on account thereof, or whether those investments are to be held on account of the legacies to the widow and the testator's daughter Emma and his son, respectively; if the legacy of $10,000 to the widow is entitled to priority, from what time it draws interest, and whether the executors should pay the expenses of the factory premises before mentioned, out of the rents of that property.

The mere fact that the legacy of $10,000 in trust for the widow and her daughter is in the will given prior, so far as respects the order in in which the gifts are stated, to the other legacies given in trust, would not, of itself, avail to give priority in payment to it, or to exempt it from abatement if there should be deficiency of assets to pay all the legacies in full. *Titus's Adm'r* v. *Titus*, 11 C. E. Gr. 111. But the legacies given to the widow are given in lieu of dower and such legacies do not, where the testator, as in this case, leaves real estate of which the legatee is dowable, abate on deficiency of assets. 2 Redf. on Wills 551; 1 Roper on Leg. 431. Such legacies are held to be given for a valuable consideration, the relinquishment of a valuable right or interest, and not merely of bounty, and, therefore, they are regarded in the light of purchase-money, for such right or interest is held to be, and for that reason entitled to preference over gifts merely voluntary. And, as the testator is the best judge of the price at which he is desirous of purchasing any such right or interest, the right of preference is not affected by the consideration that the bequest happens to exceed the value of it. 1 Roper on Leg. 433.

There is a class of cases in which it is held that a legacy given to a widow, in lieu of her dower, is, if no other means are provided for her support, entitled to interest from the testator's death, because it is given in lieu of that from which she might have derived immediate profit, and is in the nature of provision for the payment of a debt.[1] *Williamson* v. *Williamson*, 6 Paige 298; *Hepburn* v. *Hepburn*, 2 Bradf. 74; *Parkinson* v. *Parkinson*, Id. 79; *Pollard* v. *Pollard*, 1 Allen 490; 2 Wms. on Ex'rs, 1425 n.; *Irly* v. *McCrae*, 4 Desauss. 422, 423. In this court, however, in *Church at Acquackanonk* v. *Ex'rs of Ackerman*, Sax. 40, 43, the consideration that a legacy was given in lieu of dower, appears to have been regarded as of no consequence in determining the time from which it should bear interest, and it was held that the legacy in that case, which was given in lieu of dower, bore interest only according to the common rule, notwithstanding the fact that the legatee was, at the testator's death, dowable of lands of which he died seized.[2] The testator's minor child, who has no other means of support, is entitled to interest on her legacy from the death of the testator.[3] 2 Roper on Leg. 1257; *Cox* v. *Corkendale*, 2 Beas. 138. But the fact that the legacy is given for support, will not, of itself, entitle the legatee, though a child of the testator, to interest from the death of the testator, if the legatee be an adult. Nor are grandchildren entitled.[4] 2 Roper on Leg. 1271, 1272; 2 Wms. on Ex'rs 1424, 1425; *Sullivan* v. *Winthrop*, 1 Sumn. 1, 15; *Hennion's Ex'r* v. *Jacobus*, 12 C. E. Gr. 28. Nor is a wife, in the absence of express provision, entitled to the benefit of the exception, except where the legacy is in lieu of dower, and it is held that that fact entitles her to it. Therefore, while the testator's minor daughter is entitled to her share of the interest on the $10,000 legacy from his death, his daughter Emma, and his son, who are adults, are not, but are entitled to interest only after one year from his death; and so, too, as to their children. The minor daughter is entitled to $300 for her share of the interest for the year immediately succeeding the testator's death. After that her mother is entitled to the whole interest for the support of both.

The legacies to Emma and Ebenezer will, in case of deficiency of assets, abate proportionably. *Titus's Adm'r* v. *Titus*, 11 C. E. Gr. 111.

The executors are bound to take care of the factory property until it shall be sold, and it is their duty to do whatever is necessary in the premises to preserve the property; and they may pay the ex-

[1] Compare California, Civ. Code (1915), § 1369; *Welch* v. *Adams*, 152 Mass. 74; *Appeal of Townsend*, 106 Pa. 268, 273.

[2] *Barnes' Estate*, 154 N. Y. 737, affirming 40 N. Y. Supp. 494; *In re Bignold*, 45 Ch. D. 496, *accord*.

[3] *Keech's Estate*, 240 Pa. 491, *accord*. Many authorities are collected in 6 Am. & Eng. Ann. Cas. p. 527.

[4] Compare *Cooper* v. *Scott*, 62 Pa. 139; *Todd's Estate*, 237 Pa. 466; *Lowndes* v. *Lowndes*, 15 Ves. Jr. 301; *Raven* v. *White*, 1 Swanst. 553; *In re Crane*, [1908] 1 Ch. 379.

penses of superintendence, necessary repairs, insurance and taxes, out of the rents.

It results from the foregoing opinion that the executors are bound to hold $10,000 of the investments for the legacy given for the benefit of the widow and her child, the interest of which is payable to her for the maintenance and support of both; that they will be allowed $300 for the payment to the widow of that sum for support of her daughter for the year immediately succeeding the testator's death; from the expiration of that period the widow is entitled to the whole of the interest; that the rest of the funds invested will be held for the benefit of Emma and Ebenezer proportionably, and the executors will, out of the rents of the factory, pay the necessary expenses of insurance, superintendence, repairs and taxes.

LORING *v.* WOODWARD.

41 N. H. 391. 1860.

ASSUMPSIT, brought by John Loring and wife against Abner B. Woodward. The writ was dated September 16, 1859, and was brought against the defendant as executor of the will of Peggy Fuller, of Francestown, deceased, to recover the dividends on certain stocks. It was agreed that Peggy Fuller made her will on the 9th of January, 1858, and died on the 11th of February following; and her will was proved, in solemn form, on the 6th of July, 1859, and no appeal was taken.

The will contained, among other items, the following: "I give and bequeath unto my sister-in-law, Desire Loring, one half of all my stock in the following named railroads, to wit, the Lowell & Nashua Railroad, etc. Also, I give and bequeath unto the said Desire Loring, one half of my stock in the Webster Bank.

"I give and bequeath unto the children of my sister-in-law, E. West, the other half of all my stock," etc. (as above), "to be divided," etc.; "and I direct my executor to transfer all the above named stocks as above bequeathed, within one year after my decease."

The will contains several other legacies and bequests, and then gives all the rest and residue of her property to the defendant and John West.

On the 17th of January, 1859, the defendant transferred to Desire Loring the stocks bequeathed to her, and took from the plaintiffs the following receipt:

"Received of Abner B. Woodward, executor of the last will of Peggy Fuller, late of Francestown, deceased, fifty-seven shares of the Nashua & Lowell Railroad, etc., being the stocks specifically bequeathed to me by said deceased.

"Desire F. Loring.
"John Loring.

"Jan. 17th, 1859."

After the decease of Mrs. Fuller, and before the transfer of the stocks to Mrs. Loring, the defendant received dividends on said stocks to the amount of $1,274, which the plaintiffs knew at the time of giving said receipt. Before commencing this suit the plaintiffs demanded of the defendant one half of said dividends.

If it would be competent for the defendant to show, by parol, that the testatrix, at the time of executing her will, expressed her intention that these dividends should go into the residuary fund, and that such was her intention and understanding of the effect of the will, the parties admit that such was the fact.

BELL, C. J. The rules for the allowance of interest on legacies where the will is silent on that subject, seem quite simple and well settled. If a pecuniary legacy is payable generally without designation of any time of payment, it is payable at the end of the year from the death of the testator, without interest; but if not then paid, it bears interest after the expiration of the year. *Wood* v. *Pinoyer*, 3 Ves. 333; *Gibson* v. *Ball*, 7 Ves. 96; *Webster* v. *Hale*, 8 Ves. 410, 413; *Benson* v. *Maude*, 6 Madd. 15; *Freeman* v. *Simpson*, 6 Simons 75; *Sullivan* v. *Winthrop*, 1 Sum. 1; *Williamson* v. *Williamson*, 6 Paige 298; *Sholes* v. *Carr*, 3 Munf. 10.

If such a legacy is payable at a specified time, it bears interest after that time, but not before. *Heath* v. *Perry*, 3 Atk. 121; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Birdsall* v. *Howlett*, 1 Paige 32; *Stephenson* v. *Axson*, 1 Bail. Ch. 274; *Smith* v. *Field*, 6 Dana 361.

To these rules there is one exception. If the legacy is given to a child, or to an adopted child, or a child to which the testator has placed himself in the place of a parent, which is under age, and for whose support no other provision is made, it bears interest from the testator's decease. *Clarke* v. *Sewell*, 2 Atk. 90; *Wilson* v. *Madison*, 2 Y. & Coll. 372; *Bickford* v. *Tobin*, 1 Ves. Sen. 310; *Crickett* v. *Dolby*, 3 Ves. 13; *Harvey* v. *Harvey*, 2 P. W. 24; *Incledon* v. *Northcote*, 3 Atk. 438; *Chambers* v. *Godwin*, 11 Ves. 2; *Brown* v. *Timperly*, 3 Russ. 264, n.; *Sullivan* v. *Winthrop*, 1 Sum. 1; *Lupton* v. *Lupton*, 2 John. Ch. 614; see 2 Wms. Ex. 1221, note; *Hite* v. *Hite*, 2 Rand. 509.

In the case of a specific legacy, that is, a legacy of any specific article or thing, the income, profits, or produce of the article after the decease of the testator, goes to the legatee without regard to the time at which the article is to be delivered to the legatee. *Sleech* v. *Thorington*, 2 Ves. Jr. 563; *Barrington* v. *Tristram*, 6 Ves. 345; *Bristow* v. *Bristow*, 5 Beav. 289; *Sawrey* v. *Rumney*, 15 E. L. & E. 4; 2 Rop. Leg. 227; Went. Ex. 445; *Isenhart* v. *Brown*, 2 Ed. Ch. 341.

In the case of bequests to one, and in certain events over to another, each is entitled to the income during the time he is entitled to the principal. *Taylor* v. *John*, 2 P. W. 504; *Shepherd* v. *Ingram*, Amb. 448; *Montgomery* v. *Woodly*, 5 Ves. 522; 3 Atk. 102, note; *Branstram* v. *Wilkinson*, 7 Ves. 420; *Mills* v. *Roberts*, 1 R. & M. 555; *McDonald* v. *Brice*, 2 Keen 284; *Barber* v. *Barber*, 3 M. & Cr. 688.

These rules do not apply where specific directions are given by the will, or where a different intention may be inferred from its provisions. *Leslie* v. *Leslie*, Cases *temp.* Sugden 1; *Bradley* v. *Dawes*, 1 Keen 362; *Knight* v. *Knight*, 2 Sim. & Stu. 492.

As to these rules, see 2 Wms. Ex. 1221; 2 Rob. Wills 96; 2 Shars. Bla. Com. 514, n.

A legacy is specific, as has been said, when it is a bequest of a specific article of the testator's personal estate, distinguished from all others of the same kind; as, for instance, of a particular horse, or piece of plate, money in a purse or chest, a particular stock in the public funds, or a bond or other security for money. *Stevenson* v. *Dawson*, 3 Beav. 349; 1 Rop. Leg. 170; 2 Wms. Ex. 993.

In the case before us the legacy is clearly specific. "One half of all my stock in the following named railroads, to wit, the Lowell & Nashua Railroad," etc., and "one half of my stock in the Webster Bank," designate the particular stocks referred to; and if the testator had no such stocks, the legacy must fail. A legacy of *my stock*, or *in my stock*, or *part of my stock*, is deemed specific. *Kirby* v. *Potter*, 4 Ves. 750; *Wallace* v. *Wallace*, 23 N. H. 149; *Ford* v. *Ford*, 23 N. H. 212, where many cases on this point are collected; to which may be added, *Guy* v. *Sharp*, 1 M. & K. 589; *Sibley* v. *Perry*, 7 Ves. 529; *Foot, App't*, 22 Pick. 299; *Brainerd* v. *Cowdery*, 16 Conn. 1.

To this legacy, then, the general principle must apply, that the income and profits of these stocks go with the principal, unless there is something in the will indicating a different intention; and we have discovered nothing, and nothing is suggested, from which a different intention can be inferred.

It is admitted by the case, that if it would be competent for the defendant to show, by parol evidence, that the testatrix, at the time of executing her will, intended to have the dividends go into the residuary fund, the proof would be that such was her intention, and her understanding of the effect of her will.

This admission raises the question whether parol evidence is admissible to vary, change, or affect the construction or operation of a will, in respect to the allowance of the income of a legacy.

It is not questioned that the general rule of the common law is, that parol evidence is not admissible to control, change, vary, or affect any written instrument. 1 Gr. Ev. 315; 2 Phill. Ev. 350; 3 Stark. Ev. 895, 1010.

[The court then held inadmissible parol evidence to show the intention of the testator that the dividends should go to the residuary legatee. — ED.]

Judgment for the plaintiffs.[1]

[1] *Thayer* v. *Paulding*, 200 Mass. 98, *accord*. Many cases to the same effect may be found in 40 Cyc. 2101.

As to interest on demonstrative legacies, see *McWilliams* v. *Falcon*, 6 Jones Eq. 235; *Mullins* v. *Smith*, Dr. & Sm. 204, 210; *Walford* v. *Walford*, [1912] A. C. 658.

A legacy charged on land carries interest from the death of the testator. *Case* v.

HOUGHTON *v.* FRANKLIN AND OTHERS.

1 S. & St. 390. 1823.

ADMIRAL GRAVES made two codicils to his will. In the second codicil was contained the following bequest:

"I give and bequeath unto Rebecca Houghton and her mother, the sum of £160 per annum, clear of all expenses; they are to be paid £13 6*s.* 8*d.* monthly. In case her mother should die first, the same to be continued to the daughter; provided that she remains single." The testator bequeathed the residue of his personal estate to the defendants, Maria Franklin and Elizabeth Edwards.

The bill was filed by Rebecca Houghton and her mother, for the usual accounts of the testator's personal estate; and to have a sufficient part of the residue appropriated for securing the annuity of £160.

In the course of the cause a question was made as to the time from which the annuity was to commence; and that question now came on to be argued.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] As a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expression in the will to control that intention. In this will there is no such circumstance or expression; and I am, therefore, of opinion, that the payment of this annuity ought to commence from the testator's death.[1]

WELSH, EXECUTOR, PLAINTIFF IN ERROR *v.* BROWN, DEFENDANT IN ERROR.

43 N. J. L. 37. 1881.

ON writ of error to Morris Circuit.

Catherine Welsh died on the 22d of April, 1874. By her will, dated April 20th, in the same year, she made to the plaintiff the following bequest:

"I do give and bequeath to my niece, Aletta Brown, my gold watch, my melodeon, my black earrings, my black furs, one set silver teaspoons (second choice), my cashmere shawl, my brown silk dress, and the interest of twenty-five hundred dollars, to be paid to her annually by my executor; and at her death the said sum of twenty-

Case, 51 Ind. 277; *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; *Spurway* v. *Glynn*, 9 Ves. Jr. 483. Compare *Stonehouse* v. *Evelyn*, 3 P. Wms. 252. And so of a legacy in satisfaction of a debt. *Clark* v. *Sewell*, 3 Atk., 96, 99.

[1] Compare *Parker* v. *Cobe*, 208 Mass. 260; *Willcox* v. *Willcox*, 106 Va. 626; *Gibson* v. *Bott*, 7 Ves. Jr. 89, 96.

five hundred dollars shall be paid to or divided equally among any child or children of hers that may then be living, or their heirs; but if the said Aletta Brown shall die leaving no children or grandchildren living, then I do order the said sum of twenty-five hundred dollars divided equally among my heirs. I also give her all my mourning clothing."

She also gave sundry pecuniary legacies and specific legacies of personal property to different legatees, after which the will contained the following provisions:

"I do order that none of the legacies or interest herein given or bequeathed shall be due or payable during the lifetime of my mother, but that all interest that may accrue or become due on any obligations belonging to my estate shall be used for the comfort and support of my mother; and if said interest is not sufficient, then I do order my executor to pay out of my estate such sum as may become necessary for the support of my said mother and for her burial."

She further orders and directs as follows: "I do order and direct that all taxes that may be levied or assessed on any money or interest herein bequeathed or given away shall first be deducted from the said money, and the balance paid, and said money or interest shall be subject to the taxes as long as it remains in the hands or control of my executor. * * * I do order and direct that, after putting at interest a sum sufficient to pay the interest, and paying the legacies herein bequeathed, and after settling my estate, if any balance shall be found due my estate or in the hands of my executor, he shall then divide such sum, share and share alike, among my heirs."

This action was brought by Miss Brown, the legatee, against the executor of the deceased, to recover $175, one year's interest on the said sum of $2,500, accruing between the 22d of April, 1874, and the 22d of April, 1875. The defendant demurred to the declaration, and the question designed to be raised by the demurrer was, whether, under the bequest to the plaintiff, she was entitled to interest on the said sum of $2,500 from the death of the testatrix, or from the expiration of one year from that event.

This question the court below decided in favor of the plaintiff below. Hence this writ of error.

Argued at November Term, 1880, before BEASLEY, Chief Justice, and Justices DEPUE, SCUDDER, and KNAPP.

The opinion of the court was delivered by

DEPUE, J. In determining as of what time legacies shall take effect and be payable, certain general rules have been adopted; and testators, in making their wills, are considered as framing their testamentary dispositions in view of those general rules.

Specific legacies are treated as severed from the bulk of the testator's property by the operation of the will, and their increase and emolument are regarded as specifically appropriated for the benefit of the legatee from that period; though the time for the enjoyment

of the principal may be postponed to a future period. With respect to general legacies, the law, for convenience, has prescribed, as a general rule, that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and satisfied out of the testator's estate at the expiration of one year next after his death. 2 Roper on Leg. 1245; 2 Lead. Cas. in Eq. 639, notes to *Ashburner* v. *MacGuire*. On a legacy coming within the class of general legacies, if the legacy be paid at the expiration of the year, interest from that time will be allowed as damages; and interest on a legacy will not be computed from a period prior to that time, unless there be a clear expression of intention that interest shall be reckoned from an antecedent time or event. In that case the interest is regarded as of the substance of the gift, and is not recoverable, as such, unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.

To this general rule there are a few well-established exceptions. A legacy given in satisfaction of a debt will carry interest from the testator's death. *Clark* v. *Sewell*, 3 Atk. 99. Interest on a legacy to a minor child of the testator, or to one to whom the testator is *in loco parentis*, will be allowed from the testator's death as a provision for maintenance, where no provision is made by will or otherwise for the support of such legatee. *Brinkerhoff* v. *Merselis*, 4 Zab. 680; *Cox* v. *Corkendall*, 2 Beas. 138; *Hennion's Ex'rs* v. *Jacobus*, 12 C. E. Green, 28; *Ex'r of Kearney* v. *Kearney*, 2 C. E. Green, 59, 63, 504. Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event. In this respect an annuity differs from a general legacy; for a general legacy, not being payable out of the testator's assets before the end of the year from the testator's death, no interest will be due thereon until the expiration of the second year. 2 Rep. on Leg. 1245.

There is another class of cases which are apparently exceptions to this general rule; but those cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. *Green* v. *Green*, 3 Stew. 451; s. c. 5 Stew. 768; *Van Blarcom* v. *Dager*, 4 Stew. 783; 2 Spence's Eq. Jur. 552–569; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, and the notes to that case in 2 Lead. Cas. in Eq. 686 *et seq.* Cases of this class are distinguished from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. 2 Wms. on Ex'rs, 1391; *Fearns* v. *Young*, 9 Ves. 459, *per* Lord Eldon; *Baker* v. *Baker*,

6 H. of L. Cas. 623, *per* Lord Chelmsford; *Van Blarcom* v. *Dager*, 4 Stew. 783, *per* Dodd, J. In the case last cited, the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. 2 Rop. on Leg. 1320. That the computation of interest as between the life-tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate, is founded exclusively on the special equity between the parties among whom the gift is to be apportioned, is apparent from an examination of the cases. For the first year, sometimes, the interest on the whole income is allowed the life tenant; sometimes only a portion of the income for the first year is allotted to the life tenant, and the balance is added to increase the capital, for the reason that, in such cases, the circumstances are such that it would be inequitable to the remainder-man to give the whole produce of the first year to the life tenant; and sometimes the allowance to the life tenant for the first year is upon a *percentage* determined by the court, on a consideration of what would be just and equitable as between the parties, under the circumstances of the particular case. *Hewitt* v. *Morris*, 1 Turn. & Russ. 241; *Fears* v. *Young*, 9 Ves. 552; *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751; 2 Spence's Eq. Jur. 558, *et seq.*[1]

The apparent conflict in the decisions on this subject is in a large measure due to the failure to observe the special grounds on which the computation of interest is made as between the life tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate. Some of it is also attributable to expressions used in that class of cases where interest is allowed by way of maintenance for minor children, or those to whom the testator is *in loco parentis*. If those cases which are universally considered as exceptional, and as resting on special and peculiar grounds, are put aside, the decisions on the subject of interest on legacies are quite consistent and harmonious.

The contention upon which the judgment below is sought to be sustained is, that the gift to Miss Brown is of an annuity, and that the intention of the testatrix to pay her interest from her death is to be deduced from the language of the bequest.

An annuity is defined to be a yearly payment of a certain sum of money. 2 Wms. on Ex'rs, 809; *Booth* v. *Ammerman*, 4 Bradf. Sur. R. 129. The first payment of an annuity given by will is due at the

[1] Compare *Williamson* v. *Williamson*, 6 Paige 298; *Stott* v. *Hollingworth*, 3 Madd. 161; *Angerstein* v. *Martin*, Turn. & R. 232; *Amphlett* v. *Parke*, 1 Sim. 275; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Dimes* v. *Scott*, 4 Russ. 195; *Douglas* v. *Congreve*, 1 Keen 410; *Taylor* v. *Clark*, 1 Hare 161; *Morgan* v. *Morgan*, 14 Beav. 72, 92; *Macpherson* v. *Macpherson*, 1 Macq. 243.

end of one year from the testator's death. This is one of the exceptions to the general rule with respect to the enjoyment by a life tenant of the benefits given by will. Where a general legacy is given to one for life, with remainder over to another, no interest will be due until the expiration of the second year. 2 Rop. on Leg. 1253. This distinction between an annuity and a legacy for life with remainder over, was taken by Lord Eldon in *Gibson* v. *Bott*, 7 Ves. 89, 96. His language is: "If an annuity is given, the first payment is paid at the end of one year from the death; but if the legacy is given for life, with remainder over, no interest is due till the end of two years; it is only interest on the legacy, and until the legacy is payable there is no fund to produce interest." Mr. Roper approves of this distinction as founded on principle, and, speaking of the disposition of a sum of money and the interest of it given as an annuity to one for life, says that the annuity, being given in the form of interest upon a gross sum of money to be taken out of the assets as any other legacy, cannot be payable sooner than the fund produces the means for that purpose. 2 Rop. on Leg. 877.

In the present case the gift to the plaintiff is of the interest on a gross sum — $2,500 — to be paid to her annually by the executor; and after the plaintiff's death the principal sum is payable to other parties. The will provides that the executor, after putting out at interest a sum sufficient to pay the interest and legacies bequeathed, shall divide the residue among the heirs of the testatrix. It further directs that all taxes on the money or interest bequeathed should first be deducted, and the balance only paid, and that the said money or interest should be subject to the taxes as long as it remained in the hands or under the control of the executor.

In substance the bequest is to the executor to invest and pay over the net income or interest, after deducting taxes, to the life tenant during her life, and after her death, to pay the entire principal to the legatees in remainder. The executor, in the administration of the estate as executor, was under no obligation to set apart the principal sum on which interest was allowed until the end of the first year; and until that separation was made, there was no fund to produce interest for the life tenant. In legal effect the bequest is analogous to those in *Lowndes* v. *Lowndes*, 15 Ves. 301, and *Raven* v. *Waite*, 1 Swanst. 553, upon which interest was allowed only from the expiration of the year. In my examination of the English cases, I have not found a single decision in which a bequest similar to that under consideration has been considered as excluded from the general rule that the legacy shall, for such purposes, take effect after the lapse of the year. The distinction between an annuity pure and simple, which is to be paid at all events out of the testator's estate at the expense of the residuary legatee, and the interest or income for life, of a certain sum set apart by the tes-

tator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to. *Baker* v. *Baker*, supra, was decided upon that distinction. Lord Cranworth, in delivering his opinion, said: "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered, what you must look to is time: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest, or a portion of the interest, of a capital sum which is to be set apart." This distinction is recognized by Lord Justice Rolt in *Birch* v. *Shewall*, L. R. 2 Ch. App. 649. The principle on which it rests is that a bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the donee for life and the remainder-man. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainder-man after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of a year from the testator's death. The executor is not bound to set apart the legacy for investment before the end of the year; and until that be done there is no fund to produce the interest that is payable to the life tenant. In *Knight* v. *Knight*, 2 Sim & Stu. 490, the bequest was to each of the children of T. W., "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of five per cent per annum"; and interest was held to be computable only from the end of the year, for the reason that the executors would not be bound to make an investment for the security of the legatees until the end of the year.

In the courts of this country the weight of authority is in the same direction.

Judge Redfield adopts the same distinction between annuities and accruing interest when made the subject of bequests, with respect to the time when the bequest becomes operative, as was taken by Lord Eldon in *Gibson* v. *Bott*. He holds that, in case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but that, when the interest or net income of a certain sum is given, the interest will not begin to run until one year from the decease of the testator, and the first payment will, consequently, become due in two years from that date. 3 Redfield on Wills, 184, c. V., § 25, page 13. In *Lawrence* v. *Embree*, 3 Bradf. Sur. R. 364, a bequest of interest or other income of a certain sum to be invested by executors was held not to begin to carry interest until the end of one year, at which time the investment should be made; and the distinction between an annuity and a bequest of the interest of a specific sum was made the basis of the

decision. In the subsequent case of *Booth* v. *Ammerman*, 4 Bradf. Sur. R. 129, the subject received a careful consideration. The bequest under adjudication was to the testator's sister, "of the interest upon fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually," and the executors were authorized to invest the estate in such sums and upon such terms as they might deem necessary for "the due execution of the will." The testator died in October, 1854, and the legatee became a widow in May, 1855. The question was when the legacy became due, and from what time it bore interest. In delivering his opinion the learned surrogate adopted the distinction laid down by Lord Eldon in *Gibson* v. *Bott*, as a distinction in favor of annuities long recoghized in the books. In commenting on the words "the interest," and "payable annually," in answer to the inquiry he propounds, whether it is an annuity or merely an ordinary legacy, he said: "It is not a stated sum, but may be more or less, according to the earnings of the capital; in this respect it does not possess the characteristic of an annuity, but is merely interest or income. It is payable annually; in this respect it possesses a characteristic common alike to an annuity and to interest, but not peculiar to either. In the present case the testator gives 'the interest upon fifteen hundred dollars'; the gift is of interest, and that is the entire substance of the gift. The mode of payment is 'annually,' and that relates to the payment, and not to the gift. The thing given is the profits of a certain portion of the estate, to be separated in money and invested. It is given as interest of a demonstrated capital, and interest cannot, therefore, begin to accrue until the capital becomes due. The provision of the will would, therefore, seem to be satisfied by making the investment at the end of the year, and paying the interest annually to the life tenant. The will expressly provides for this investment, and, on the decease of the legatee, to whom the interest is bequeathed for life, gives the *corpus*, or capital, over. This bequest is substantially a legacy for life with remainder over; and the legacy would not become due so as to draw interest till the end of the year, unless otherwise specially directed. I do not think the direction to pay interest annually sufficient to take the case out of the general rule." These remarks have been quoted for the reason that they are applicable to the bequest under consideration, and, in my judgment, are a correct exposition of the law on the subject. In that case the direction was that the bequest should take effect in case the legatee "should become a widow." She became a widow within the year. The surrogate regarded that language as prescribing a condition or contingency on the happening of which the legacy became due, and gave interest from the happening of her widowhood, and denied that the words "payable annually" amounted to such a special direction as would carry interest from the testator's death.

In *Cogswell* v. *Cogswell*, 2 Edw. Ch. 230, under a direction that executors should invest in stock a sum of money which would produce an annual income of $1,000, and to permit testator's wife to take such income from time to time as the same should become payable, the executors were allowed one year to make the investment.

An examination of the cases which are usually cited as holding a different principle will disclose the fact that, with a few exceptions, they are cases coming within some one of the exceptions above stated to the general rule.

In *Williamson* v. *Williamson*, 6 Paige, 298, the bequest was of the interest or income of the residuary estate to the legatee for life. In *Craig* v. *Craig*, 3 Barb. Ch. 76, one of the bequests was in the form of a direction for the investment of such a sum as would produce in legal interest $500 per annum, as a provision for the testator's lunatic son, which should give him "a sure and ample support during his life"; the other was of an annuity of $1,000 per year to the testator's wife, the principal to be invested as she might reasonably require. In *Cook* v. *Meeker*, 36 N. Y. 15, the legatees for life were the wife, daughter, and grandchildren of the testator, and their legacies were considered as intended to provide a fund for their support and maintenance. *In re Devlin's Estate*, 1 Tucker, 460, the legatees were children without any other means of support, and the case was expressly decided upon the distinction between interest upon a sum of money left as a legacy, and an annuity or income bequeathed for the support of the legatee. In *Swett* v. *Boston*, 18 Pick. 123, the gift to the legatee was of the interest of $50,000 from the time of the testator's decease during the life of the legatee. In *Brimblecom* v. *Haven*, 12 Cush. 511, the bequest was "of the interest of $6,000," without any gift over of the principal sum: and the court held that, there being no setting apart of any fund to answer the legacy, it was, in effect, the gift of an annuity of a fixed sum of money annually, fixed and expressed by the term "interest of $6,000." The two cases cited from the courts of Pennsylvania (*Eyre* v. *Golden*, 5 Binn. 472, and *In re Hilliard's Estate*, 5 Watts & Serg. 30) may be considered as direct authorities in favor of the view adopted by the court below. But these cases, if they do not stand alone, are contrary to the great weight of authority, and are against correct principles.

The decisions in the courts of this State on this subject have adopted and followed the law as laid down by Lord Eldon and by Mr. Roper.

In *Halsted* v. *Meeker, Ex'r*, 3 C. E. Green, 136, upon a direction in the testator's will that executors should place the sum of $20,000 at interest, and pay the net income or interest thereof, semiannually, to the testator's daughter, Chancellor Zabriskie held that the executors were required to invest at the end of the year, and that the legatee was entitled to the interest which should accrue from that time. In *Henion's Ex'rs* v. *Jacobus*, 12 C. E. Green, 28, the

bequest was to the testator's daughter, of the legal interest of $1,400, to be paid to her annually, and the principal at her death to be divided among her heirs; Chancellor Runyon held that the interest payable to the testator's daughter was to be computed from the end of one year from the testator's death. The same rule was reaffirmed and applied in *Howard* v. *Francis*, 3 Stew. 444. These cases from the Court of Chancery were cited with apparent approval in *Van Blarcom* v. *Dager*, 4 Stew. 495. They are decisions of a court of co-ordinate jurisdiction, and ought not to be disregarded or overruled except for the most cogent reasons. They apply directly to this case, and in my judgment were correctly decided.

I think that for the reason already given, the judgment should be reversed.

It may be remarked that, on a ground that may be technical, and was not taken on the argument, the same result would be reached. The testatrix directs that none of the legacies or interest given or bequeathed shall be due or payable during the lifetime of her mother. A copy of the will is annexed to the declaration, and by averment, made part of it; and the death of the mother of the testatrix is nowhere averred in the pleading.

Judgment reversed.[1]

IN RE PEARCE.

CRUTCHLEY *v.* WELLS.

[1909] 1 Ch. 819. 1909.

ADJOURNED SUMMONS.

The testator Sir W. G. Pearce, Bart., bequeathed to his wife all his furniture and effects, horses, carriages, motor cars, yacht, and jewellery, and gave his residuary estate to the plaintiffs, his executors and trustees, upon trust to pay the income thereof to his wife during her life, and after her death upon trust, in the events which happened, for Trinity College, Cambridge, absolutely.

The testator died on November 2, 1907, and his will and codicils were proved by the plaintiffs on December 18, 1907, the gross value of his estate being sworn at the sum of 469,764*l.* 12*s.* 2*d.*

The testator's widow died on December 23, 1907, having by her will appointed the defendants S. R. Wells and G. G. Vertue her executors, who proved her will on March 28, 1908.

After the death of the testator the plaintiffs incurred considerable expense in retaining a large part of the staff of men and women

[1] *Gibson* v. *Bott*, 7 Ves. Jr. 89, 96 (*semble*), *accord*. *Webb* v. *Lines*, 77 Conn. 51; *Matter of Stanfield*, 135 N. Y. 292; *Flickwir's Estate*, 136 Pa. 374; *Todd's Estate*, 237 Pa. 466, 470 (*semble*); *Keech's Estate*, 240 Pa. 491, 494 (*semble*), *contra*. Compare *Ayer* v. *Ayer*, 128 Mass. 575; *Loring* v. *Thompson*, 184 Mass. 103.

servants in one of the testator's houses in order to maintain and keep in good order the furniture and effects thereof and to look after the horses and carriages specifically bequeathed by the testator to his wife, and in paying the wages and expenses of the captain of the yacht and in repairs to the yacht.

The plaintiffs assented to the different specific bequests at various dates between March 23, 1908, and May 14, 1908.

Subsequently the plaintiffs took out this summons for the determination of the question whether the estate of the testator's widow should bear any, and what, part of the cost of the upkeep, care, and preservation of the furniture and effects, horses and carriages, and yacht.

EVE, J., stated the facts, and continued: The question which I have to decide is whether the moneys which have been expended ought to come out of the general estate or ought to be borne by the specific legatee. Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent, and I shall make a declaration to that effect, and direct an inquiry what expenses were properly incurred in and for such upkeep, care, and preservation.

SECTION VIII.

DISTRIBUTIVE SHARES. ADVANCEMENTS.

England.

STAT. 22 & 23 CAR. II., c. 10 (1671). *An act for the better settling of intestates' estates.* Be it enacted by the king's most excellent majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.: —

II. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession or any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of . And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear,

that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice: (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate; (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws: (4) saving to every one, supposing him or themselves aggrieved, right of appeal as was always in such cases used.

IV. Provided, that this Act, or anything herein contained, shall not anyways prejudice or hinder the customs observed within the city of London or within the province of York or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding.

V. Provided always, and be it enacted by the authority aforesaid, that all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: (3) and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intes-

tate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: (4) but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them.

VII. Provided, that there be no representations admitted among collaterals after brothers' and sisters' children: (2) and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: (3) and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. Provided also, and be it likewise enacted by the authority aforesaid, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; (2) and that such and every one to whom any distribution and share shall be allotted shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing to the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. Provided always, and be it enacted by the authority aforesaid, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made.

STAT. 1 JAC. II., c. 17, Sec. 7 (1685). Provided also, and it is further enacted by the authority aforesaid, that if after the death of a father,

any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; anything in the last-mentioned Acts to the contrary notwithstanding.

"NOTE. — The husband was entitled to the wife's choses in action. St. 29 Car. II. c. 3, Sec. 25 (1677), p. [417], *ante; Cart* v. *Reeves*, 2 Eq. Cas. Abr. 423, pl. 7 (1718). Under the Statute of Distributions, where the intestate leaves grandchildren and great-grandchildren, but no children, the estate is divided into as many shares as there are children who have left living descendants, and the descendants of each such child take the child's share by representation, the division among the descendants of each child being *per stirpes*. *In re Ross's Trusts*, L. R. 13 Eq. 286 (1871). And where the intestate left only grandchildren, the grandchildren were held to take *per stirpes* and not *per capita*. *In re Natt*, L. R. 37 Ch. D. 517 (1888).

A brother takes to the exclusion of a grandfather. *Evelyn* v. *Evelyn*, Ambl. 191 (1754). If the intestate leaves nephews and nieces, but no brothers or sisters, the nephews and nieces take *per capita*. *Walsh* v. *Walsh*, Prec. Ch. 54 (1695). And if there is no brother or sister, nephews and nieces must share with uncles and aunts, all taking *per capita*. *Durant* v. *Prestwood*, 1 Atk. 454 (1738).

Where the next of kin are all more remote than brothers and sisters, no one is entitled to take by representation. *Maw* v. *Harding*, 2 Vern. 233 (1691).

The half blood take equally with the whole blood. *Watts* v. *Crooke*, Show, P. C. 108. And see *Burnet* v. *Mann*, 1 Ves. Sr. 156 (1748).

Under the St. Jac. II. c. 17, Sec. 7 (1685), where an intestate leaves a wife, mother, brothers, and sisters, but no issue, the wife takes half, and the other half goes among the mother, brothers, and sisters equally. *Keylway* v. *Keylway*, 2 P. Wms. 344 (1726). So where he leaves a wife, mother, and the children of a deceased brother, but no issue or brothers or sisters, the wife takes half; the mother a quarter; and the nephews and nieces, the other quarter. *Stanley* v. *Stanley*, 1 Atk. 455 (1739). And under the same Statute, brothers and sisters of the half blood, as well as of the whole blood, share with the mother. *Jessopp* v. *Watson*, 1 Myl. K. & 665 (1833).

A widow to whom a legacy has been given in lieu of all claims on the estate may yet share in personal property which has become undisposed of by reason of a lapsed or void residuary bequest, *Pickering* v. *Stamford*, 3 Ves. 332 (1797); but not in personal property which is undisposed of on the face of the will. *Lett* v. *Randall*, 3 Sm. & G. 83 (1855)." 4 Gray, Cas. on Prop. (2d ed.), p. 665.

Illinois.[1]

Annot. Stats. (1913), Par. 4205 (c. 39, Sec. 4). Any real or personal estate given by an intestate in his life-time as an advancement to any child or lineal descendant shall be considered as part of the intestate's estate, so far as it regards the divisions and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate; but he shall not be required to refund any part thereof, although it exceeds his share.

Par. 4206 (c. 39, Sec. 5). If such advancement is made in real estate, and the value thereof is expressed in the conveyance or in the charge thereof made by the intestate, or in the written acknowledgement thereof by the party receiving it, it shall be considered

[1] For Statutes on the distribution of personal property of an intestate decedent in Illinois, see *ante*, pp. 8–9.

as of that value in the divisions and distribution of the estate; otherwise it shall be estimated according to its value when given.

Par. 4207 (c. 39, Sec. 6). If such advancement is made in personal estate of the intestate, the value thereof to be estimated the same as that of real estate; and if, in either case, it exceeds the share of real or personal estate, respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less of the other part of the intestate's estate as will make his whole share equal to the shares of other heirs who are in the same degree with him.

Par. 4208 (c. 39, Sec. 7). No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant.

Par. 4209 (c. 39, Sec. 8). If a child, or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them.

Massachusetts.[1]

Rev. Laws (1902), c. 140, Sec. 4. Property, real or personal, which is given by an intestate in his lifetime as an advancement to a child or other lineal descendant shall be considered as part of the intestate's estate in the division and distribution of such estate among his issue, and shall be taken by such child or other descendant toward his share of such estate; but he shall not be required to restore any part thereof, although it exceeds his share. The widow shall be entitled only to her share in the residue after deducting the value of the advancement.

Sec. 5. If such advancement is made in real property, the value thereof shall be considered as part of the real property to be divided; if it is in personal property, it shall be considered as part of the personal property; and if in either case it exceeds the share of real or personal property, respectively, which would have come to the heir so advanced, he shall not restore any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to the shares of the other heirs who are in the same degree with him.

Sec. 6. Gifts and grants shall be held to have been made as advancements, if they are expressed in the gift or grant to be so made, or if charged in writing as such by the intestate, or acknowledged in writing as such by the party receiving them.

[1] For Statutes on the distribution of personal property of an intestate decedent in Massachusetts, see *ante*, pp. 9–11.

Sec. 7. If the value of an advancement is expressed in the conveyance, in the charge thereof made by the intestate or in the acknowledgment by the person receiving it, such value shall be adopted in the division and distribution of the estate; otherwise it shall be determined according to the value when the property was given.

Sec. 8. If a child or other lineal descendant who has received an advancement dies before the intestate, leaving issue, the advancement shall be considered as part of the intestate's estate in the division and distribution of such estate, and the value thereof shall be taken by the representative of the heir to whom the advancement was made toward his share of the estate, as if the advancement had been made directly to him.

Sec. 9. The probate court in which the estate of a deceased person is settled may hear and determine all questions of advancements arising relative to such estate, or such questions may be heard and determined upon a petition for partition either in the superior court or the probate court; but if such question arises upon a petition for partition, the court may suspend proceedings until the question has been decided in the probate court in which the estate of the deceased is settled.

New York.

Consol. Laws (1909), Decedent Estate Law, Sec. 96. If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement.

Sec. 97. When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property,

the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

SEC. 98. If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal proportions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus

shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half, and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers and sisters, descendants. This subdivision shall not apply to the estate of a decedent who shall have died prior to May eighteenth, nineteen hundred and five.[1]

13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

15*a*. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be allotted to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall be distributed equally among them.[2]

16. If there be no husband or wife surviving and no children,

[1] Thus amended by Acts (1909), c. 240, § 14.

[2] Added by Acts (1913), c. 489.

and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteen of the code of civil procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.[1]

Sec. 99. If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of the surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

RICKENBACKER *v.* ZIMMERMAN.

10 So. Car. 110. 1877.

McIver, A. J.[2] On the 24th January, 1870, the intestate insured his life for the sole benefit of his daughter Cornelia, and, having subsequently married a second time, died intestate on the 12th March, 1874, leaving as his heirs-at-law and distributees, his widow and two children of his last marriage, Ida and Ella, together with the appellant Cornelia. Under proceedings for partition and settlement of his estate two questions arose: 1. Whether such insurance was an advancement to the appellant. 2. If so, how should such advancement be valued. The Circuit Judge held that the insurance was an advancement, and that the value of the advancement was the sum named in

[1] Amended by Acts (1913), c. 489.

[2] Only the opinion is given.

the policy and received by the guardian of appellant. From this decision the appeal is taken.

In the absence of any direct authority upon these points, these questions must be determined upon the general principles regulating the law in respect to advancements, aided by such analogies as may be afforded by the decided cases.

In 1 Bouv. Law Dic., 76, the term "advancement" is defined to be "that which is given by a father to his child or presumptive heir by anticipation of what he might inherit." In *McCaw* v. *Blewit*, 2 McC. Ch., 91, the leading case on the subject of advancements in this State, no definition of the term is given in the decision of the Court of Appeals, but in the circuit decree it is defined to be "such a part of a man's estate as he gives to a child on marriage, or on setting out in life, which may be necessary for its settling in the world."

In the argument of this case the counsel for the appellant, who afterwards became one of the most eminent Chancellors of this State, questions the correctness of this definition, and says: "If a definition may be ventured, an advancement is the gift of a parent to a child beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child."

But, after long experience on the bench, this distinguished Judge seems to have reached the conclusion that it was not an easy matter to frame an accurate definition of the term. — *Murrell* v. *Murrell*, 2 Strob. Eq., 151. While, however, it is a difficult matter to frame such a definition as will cover every possible case, there are certain essential elements which every advancement must possess, one of which is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.

This is obvious from the very terms of our Act of 1791 (corresponding with the terms of Section 7, Chapter LXXXV, General Stat., p. 440), as construed by the case of *McCaw* v. *Blewit, supra;* and, as Johnston, Ch., says in *Ison* v. *Ison*, 5 Rich. Eq., 19, "an advancement always embraces the idea that the parent has parted from his title in the subject advanced." Even the case of *Clark* v. *Wilson*, 27 Md., 693, which is much relied on by the respondents, recognizes this idea, for in that case it is said: "An advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the party making it and intestate," evidently implying that it must be a part of the ancestor's estate of which the child would be entitled to inherit a part in case of intestacy. So, too, in *Miller's Appeal*, 31 Penn., 338, an advancement is said to be "a pure and irrevocable gift by a parent, in his lifetime, to his child, on account of such child's share of the estate

after the parent's decease." And in *Dilman* v. *Cox*, 23 Ind., 442, it is said: "The true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

If, then, one of the distinguishing features of an advancement is that it must once have been a part of the ancestor's estate, which, but for the gift by way of advancement, would descend to his heirs, the next question to be considered is whether this policy of insurance or the money secured by it ever constituted any portion of the intestate's estate. The finding of fact by the Circuit Judge is that "the intestate in his lifetime . . . insured his life for the sole benefit of his daughter, Cornelia, . . . for the sum of four thousand dollars, payable upon his death, and then and thereafter paid regularly up to the time of his death an annual premium of ninety-nine 12-100 dollars," &c.

The policy recites that the first premium was paid by the said Cornelia, and upon what evidence, if any, the Circuit Judge based his finding contradictory of this recital does not appear. Assuming, however, as we must do, the correctness of the finding of the Circuit Judge, inasmuch as in the case agreed upon he says, after stating the facts as found by him, that "concerning the foregoing facts there was no dispute," the inquiry is whether this policy or the money secured by it ever constituted any part of the intestate's estate which, in any event, could have descended to and become distributable amongst his heirs and distributees, or which he could, by his will, have given to one or more of them. The authorities leave us in no doubt upon this point.

In Bliss on Life Insurance (Sec. 317), it is said the rule is "that a policy and the money to become due under it belong, *the moment it is issued*, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his or hers, by deed or by will, to transfer to any other person the interest of the person named." Again, at Section 328, the writer says: "Payment of the premium without any contract with the person entitled to the benefit of the policy gives no title to it." And, again, at Section 339, it is said: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums unless he has covenanted so to do; but if he does so, the person originally designated in the policy will derive the benefit."

To the same effect, see May on Insurance, p. 447, Sec. 392.

The cases which were principally relied upon by the respondents do not, in our opinion, conflict with these views. The case of *Edwards* v. *Freeman* (2 P. Wms. 435), was this: Richard Freeman, in contem-

plation of marriage with his first wife, Elizabeth, by articles, covenanted with the father of Elizabeth, in consideration of the marriage and of a marriage portion of £5,000, to settle certain lands to the use of himself for life, remainder to said Elizabeth, remainder to his first and other sons in tail male successively, remainder to trustees for five hundred years to raise portions for the daughters of the marriage, payable at eighteen or marriage, and to raise maintenance for such daughters, until their portions became payable, of £80 per annum. The marriage having been consummated and the only issue being one daughter, and Elizabeth dying, Richard Freeman married again and died intestate, leaving a widow and two children of the last marriage and the daughter of the first marriage. The question was whether the provision for the daughter of the first marriage could be regarded as an advancement: *Held*, That the £5,000 portion was an advancement, but not the annual provision for maintenance. The difference between that case and the one now before the Court is, that there the gift was of a portion of the intestate's estate, while here the sum of money secured by the policy never did constitute any part of the intestate's estate. For, as the Master of the Rolls says in that case, "the present case comes nearer to land than if it had been a charge out of land; for the trust of the five hundred years' term being only to raise this £5,000 portion, and the plaintiff, Mary Edwards, being the person who is alone entitled to it, she, as to this purpose, is, in effect, the owner of the five hundred years' term."

It was, therefore, practically a gift to the daughter of a lease for five hundred years of the lands specified; that is, it was a gift of a portion of the intestate's estate. *Kircudbright* v. *Kircudbright* (8 Ves., 51) was a case in which a father gave a bond to his son to secure the payment of a certain annuity until his son should be in possession of a living of a certain annual value, and by an agreement of the same date the son covenanted that he would forthwith enter into holy orders and accept such living. The father paid the annuity regularly for nine years, but the son failed to take orders and qualify himself for a living, and upon the death of the father intestate the question arose whether this annuity could be regarded as an advancement, and, if so, at what value it should be charged.

Lord Eldon, after expressing some doubt as to the legality of the transaction as being contrary to public policy, decided that, the son having failed to comply with the condition for nine years, the annuity was determinable by the father or his representatives, and that, while it should be regarded as an advancement, it was a very doubtful question as to how it should be valued, and, finally, gave the son the option to have it valued at the date of the grant or to estimate its value by the amount of the payments made under it. Besides, the fact that the very doubtful terms in which this decision was made deprives this case of much of the weight which it would

otherwise possess; it may be remarked that here, too, the advancement was, practically, of a portion of the intestate's estate — the annuity being a charge upon that estate. It was also held in this case that a commission in the army, which the father had purchased for another son, was an advancement, to be valued at the sum paid for it, of which we will speak hereafter.

If, then, this policy of insurance never constituted any part of the estate of the intestate, the next inquiry is, was it something purchased for the child with the funds of the father, and, if so, how and when is its value to be estimated. Assuming that the finding of fact by the Circuit Judge is correct, then it follows that this policy of insurance does possess this distinguishing feature of an advancement, viz., that it was a thing purchased with the funds of the father in the name and for the benefit of the child. The thing purchased being the policy of insurance, and the purchase having been made and the gift completed the moment it was issued, as we have seen above, that is as soon as the first premium was paid, the only remaining inquiry is how and when is its value to be ascertained. Our Act of 1791, differing in this respect from the statute of 22 and 23 Charles II, fixes this beyond dispute by declaring that such value shall be "estimated at the death of the ancestor, but so as that neither the improvement of the real estate by such child or children nor the increase of the personal property shall be taken into the computation," or, as it is stated in the leading case of *McCaw* v. *Blewit*, *supra*, in order to ascertain the amount at which an advancement is to be charged, it "is to be estimated at what it is worth at the time of the death, relation being had to its situation at the time of the gift." The advancement or thing given being the policy of insurance, and the time of the gift being the moment it was issued, to ascertain its value, according to the rule established by our statute as construed by our Courts, the inquiry is, not what it cost, as was held in *Kircudbright* v. *Kircudbright*, under the English statute, in reference to the commission in the army, because that is not in accordance with the rule as established by our statute, for, as is said by Johnston, Ch., in *Cooner* v. *May* (3 Strob. Eq., 189), "it is not the sum expended, but the thing which is bought with it — the thing received by the child — which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced"; but the inquiry is, what a policy for a like amount, upon which the first premium had been paid, on the life of a person, with like expectation of life and of the same age as the father of appellant was when this policy was issued, be worth on the 12th March, 1874, the date of intestate's death?

It is true that it is stated that by one of the regulations of the company issuing this policy a policy drawn in favor of a minor child, as this was, is "neither purchasable nor assignable." But without stopping to inquire whether such a regulation, not incor-

porated in or forming a part of the policy, which is the contract between the parties, could abridge the rights of the holder of the policy, it is sufficient to say that the inquiry should be what would *such* a policy be worth at the date of the death of the intestate in the condition in which this one was at the time when it was issued, that being the time when the gift was made. If, however, from any cause, it should appear to be of no value, then the result would be that it was no advancement.

The question as to the payment by the father of the premiums subsequent to the first presents more difficulty; but we are inclined to regard them as advancements of so much money: like the case of a father who, after having given his child a piece of property — a residence, for example, — expends considerable sums of money from year to year in making improvements or additions to the buildings. In such a case, the thing given is the money expended; and while it is true that ordinarily the sum expended does not furnish the rule for estimating the value of an advancement, yet where, as in this case, the thing given is money, there is no other mode of estimating its value except by the amount given.

The suggestion in the argument of respondents that the premiums paid might exceed the amount received on the policy, or that the whole might be lost by the failure of the insurance company, loses all its force in view of the decisions holding that the child is chargeable with the value of the advancement even though the thing constituting the advancement had ceased to be property before the settlement is made, as in cases of advancement in slaves. — *Manning*, 12 Rich. Eq., 410; *McLure* v. *Steele*, 14 Rich. Eq., 115.

So that we think the advancement in this case was, first, the policy of insurance, the value of which is to be ascertained in the manner above indicated, that being the thing which was purchased with the first premium, and that all subsequent premiums were advancements of so much money, which, of course, will bear no interest except from the time of the death of the intestate.

The authorities relied upon to show that the true value of the advancement in this case was the amount of money received by the child do not, in our opinion, sustain such a position, inasmuch as these cases are from States where the Statutes of Distributions are not like ours, and the decisions were made to turn upon the phraseology of the respective statutes.

In *Clark* v. *Wilson* (27 Md., 693), a father made a deed of trust of certain lands for the benefit of his children of the first marriage, reserving a life estate to himself. The questions were, first, whether the property conveyed by the deed of trust was an advancement, and, second, if so, whether it should be valued at the date of the deed or at the date of the father's death. It was held that the property was an advancement and that it should be valued at the date of the father's death, when the life estate fell in and the

remainder took effect, or when the children received possession of the property.

The case turned upon the language of the Maryland statutes: "The value thereof at the time such advancement was received" — the Court construing those words to mean when the property actually goes into the possession of the child.

The case of *Wilkes* v. *Green* (14 Ala., 443) was this: A father made a deed of slaves to his children, reserving a life estate to himself, and the same questions arose. The Court, basing its decision upon the language of the Alabama statute, which provides that the value of the property constituting the advancement shall be fixed "at the time it was delivered," held that the children were chargeable with the value of the property at the time they came to the actual possession of it.

In *Hook* v. *Hook* (13 B. Monroe, 528), a father conveyed to certain of his children certain lands and slaves, reserving a life estate to himself. The Kentucky statute provided that "all advancements should be estimated at their value when made," and the Court held that the advancement should be deemed to have been made at the time the advancement is "made complete by the actual possession and enjoyment of it." These cases, besides resting upon the particular phraseology of the several statutes of the several States in which they were decided, differ materially from the one now before the Court. In each of them the property constituting the advancement was a part of the father's estate *and continued in his use and enjoyment and under his control up to the time of his death*, while in the case now under consideration the policy of insurance was never a part of the father's estate and was never in his own use or under his control. The case of *Meadors* v. *Meadors* (11 Iredell, 148) is likewise relied upon. That case, however, turned upon the special provisions of the North Carolina statute and throws no light upon the questions we are considering. Many of the cases from other States cited in the argument hold that the question of advancement is one of intention, but such does not seem to be the rule in this State.

In *Rees* v. *Rees* (11 Rich. Eq., 86), it was held that whether property given by a parent to a child shall be considered as an advancement is not a question of intention. It is very true that what is or is not an advancement may depend upon the circumstances or condition of the parties, as in *McCaw* v. *Blewit*, 2 McC. Ch., 91; *Murrell* v. *Murrell*, 2 Strob. Eq., 148, and *Ison* v. *Ison*, 5 Rich. Eq., 15; "but the mere declarations of the donor cannot alter the operation of the law either as to the character of the gift or even the mode of valuation."

The judgment of the Circuit Court, in so far as it conflicts with the principles herein announced, is set aside and the cause remanded for further proceedings in accordance with the principles herein established.

WILLARD, C. J., and HASKELL, A. J., concurred.

BEEBE, RESPONDENT *v.* ESTABROOK ET AL., ADMINISTRATORS, ETC., APPELLANTS.

79 N. Y. 246. 1879.

ANDREWS, J. This action is brought for an accounting and distribution of the estate of Hobart Estabrook, deceased, who died intestate on the 18th day of May, 1872, leaving his widow him surviving and five sons and a grandchild, the daughter of a deceased daughter of the intestate, and a great granddaughter the daughter of a deceased grandchild whose mother, also a daughter of the intestate, had died in his lifetime, his only descendants. The intestate left no real estate, but personal property only. Prior to his death he had given various sums to his children. He gave to each of them on their marriage the sum of $500, and in 1867 he gave to each of his sons the sum of $2,000 and in 1872, a few weeks before his death, an additional sum of $3,000.

It is found by the referee that the several sums given by the intestate to the sons were advanced to them respectively as a portion of his estate with a view to their settlement in life and were chargeable to them in the final settlement of the estate as a part of their distributive shares, not only as between themselves, but also as between them and the descendants of their deceased sisters. This presents the principal question in this case, viz.: whether advancements made by a father in his life-time to his children are, on the final distribution of his estate in case of intestacy, when the estate consists exclusively of personal property, to be taken into account in determining the distributive shares of grandchildren or other descendants of children of the intestate who had died before him, or, in other words, are such descendants entitled to claim the benefit of advancements made by the intestate to his children in the settlement of his estate.

This question depends upon the construction of the statute in respect to advancements. The right to charge advancements made by an intestate to his children against their distributive shares in his estate depends upon positive law, and the statute regulates the right and prescribes the circumstances and limitations under which the right exists. The seventy-sixth section of the statute of distributions (2 R. S., 97) is as follows: "If any child of such deceased person shall have been advanced by the deceased by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed *among the children*, and if such advancements shall be equal or superior to the amount which, according to the preceding rules, would be distributed to such child as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of

such surplus." The seventy-seventh section declares that if such advancement shall not be equal to such amount, such child or his descendants shall be entitled to receive so much as shall be sufficient to make all the shares of all the children in such surplus and advancement to be equal as near as can be estimated. The seventy-eighth section declares that the maintaining or educating, or the giving of money to a child without a view to a portion or settlement in life, shall not be deemed an advancement, and that the two preceding sections shall not apply to any case where there shall be any real estate of the intestate to descend to his heirs.

This case is governed by these provisions of the statute. The argument that a grandchild cannot, in the distribution of the estate of an intestate, have the benefit of advancements made by him to his immediate children, is founded upon the language of section seventy-six, that such advancements are to be reckoned with that part of the surplus of the personal estate "which shall remain to be distributed among the children," and it is claimed that the word *children* is to be taken in its popular sense as referring to the immediate offspring of the intestate, and that it is only as between the immediate children of the intestate that the question of advancements can be considered in making distribution. We are of opinion that this is not the true sense of the statute, and that the word *children* in the section quoted is used to designate all the descendants of the intestate entitled to share in the distribution.

The seventy-sixth section was a revision of the prior statute upon the same subject (1 R. L., 313, Sec. 16), and the prior statute was nearly a literal transcript from the English statute 22 and 23 Car., II. The revisers changed the phraseology of the statute of 1813, but they say in their note that they did not intend to make any alteration in principle. The sixteenth section of the act of 1813 clearly gives to grandchildren the benefit of advancements made by the intestate to his immediate children. It declares that distribution of the personal estate of the intestate (deducting debts, etc.) shall be made amongst the wife and children, or children's children, one-third to the wife of the intestate, "and all the residue by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children (in case any of said children be then dead) other than such child or children who shall have any estate by settlement or shall be advanced by the intestate in his life-time by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution shall be made," and if the advancement is not equal to such share, provision is made for making up the deficiency. It will be seen that by this statute both children and the representatives of children were to have the benefit of advancements. In *Smith* v. *Smith* 5 Ves., 721, the question was raised by a son of a younger son of the intestate whether the eldest son was

chargeable with a certain sum laid out by the intestate in repairs of houses which descended to the eldest son as heir. The court decided that the money so laid out could not be considered an advancement, but it was not suggested that the grandson could not raise the question.

Construing the seventy-sixth section of our statute in view of the prior law and of the declared intention of the revisers that there was no intention to change it in principle, we should not expect to find a change so material as that which is contended for by the appellants. But there are strong and, we think, conclusive reasons to be drawn from a consideration of the general spirit and design of our statutory system for the distribution of the estates of intestates, and of cognate provisions of the statute, against the construction of the seventy-sixth section which the appellants claim. The general principle pervading the statute of distribution and descents is that there shall be equality between the children of the intestate and the descendants of deceased children *per stirpes*. If the daughters of the intestate had survived him, there could have been no question of their right to an account of advancements made by him to the sons, and the principle of equality of distribution would seem to require that their descendants should stand in their place. The word *children* may be construed in a collective sense as embracing descendants when the sense and reason of a statute or of a deed or other instrument justifies it. 4 Kent, 419; *Provitt* v. *Rodman*, 37 N. Y., 42, and cases cited. It is claimed that it must be construed to have been used in its popular sense in the section in question, for the reason that the seventy-fifth section discriminates between children and the representatives of children, by using the latter phrase when grandchildren or other more remote descendants are intended. There is some force in this view, but we think it does not overthrow the strong presumption derived from a consideration of the general policy of equality of distribution, indicated by the statute. By the same argument it might be proved that grandchildren were not, under the Statute 22 and 23, Car. II, entitled to share at all in the distribution of an intestate's estate where the intestate left no wife surviving, for the seventh section of that statute declares that in case there be no wife "then all the said estate to be distributed equally to and amongst the children," making no mention of the representatives of a child, although that phrase is used in previous sections of the act.

But there is another consideration which seems to render it clear that the word *children* in the seventy-sixth section was intended to embrace grandchildren and other descendants of the intestate. The twenty-third section in the statute of descents (1 R. S., 752) also contains a provision on the subject of advancements, as follows: "If any child of an intestate shall have been advanced by him by settlement or portion of real or personal estate or of both of them,

the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate descendible to his heirs and to be distributed to his next of kin according to law; and if such advancements, be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased as above reckoned, then such child or descendants shall be excluded from any share in the real and personal estate of the intestate." This section furnishes the only rule for charging advancements where real estate is left by an intestate. The provisions relating to advancements contained in the statute of distribution, by the express terms of the seventy-eighth section, are inapplicable in such case. Where an intestate leaves real estate, then, by the twenty-third section advancements, whether in real or personal estate, are to be reckoned as part of the real and personal estate of the intestate "descendible to his heirs and to be distributed to his next of kin." Plainly under this section all descendants of the intestate entitled to take under either the statute of descents or of distribution, however remote from the intestate, are to have the benefit of advancements if the case is one to which this section applies, viz.: where the intestate left real estate descendible to his heirs. If therefore the intestate in this case had left real estate to pass by descent, the descendants of his two daughters would have been entitled to the benefit of the advancements to the sons irrespective of the value of such real estate. It cannot reasonably be supposed that the Legislature intended to prescribe a different rule in the two cases, and to exclude the grandchildren from the benefit of advancements where the estate consisted of personal property exclusively, and give them such benefit when the intestate left real estate, however small its value might be. The two statutes are *in pari materia* and are to be construed together. It is to be assumed that the Legislature intended to make a consistent and harmonious system and that the same policy of admitting grandchildren to share in the benefit of advancements existed in enacting both statutes. We think the seventy-sixth section of the statute of distributions is to be construed as if the word *descendants* had been used in place of *children*, and that the clause prescribing that advancements should be reckoned with that part of the surplus of the personal estate "which shall remain to be distributed among the children" was inserted to exclude any inference that the widow was to have any benefit therefrom, and to confine such benefit to the descendants of the intestate.

It is claimed that the evidence did not justify the finding that the sums given by the intestate to his sons in 1867 and 1872 were intended as advancements within the statute. The gift of $500 made by the intestate to each of his children on their marriage was clearly intended as an advancement. The testator entered the amount against each child in a book kept by him as so much given

to each as a portion of his estate and took receipts from them expressing that fact. The gift of 1867 was entered against each of the sons in the same book and on the same page on which the entries of the previous gift were made in the handwriting of one of the sons with whom the father was then living. He was then nearly eighty years of age, but the evidence authorizes the inference that he had possession of the book and knew of the entries made by his son therein and adopted them as his own. The gift of 1872 was a short time only before the intestate's death. It would not be useful to recapitulate the facts bearing upon the question whether these gifts were intended as absolute gifts and not to be reckoned as advancements. It is sufficient to say that the presumption of law is that they were intended as advancements, 4 Kent, 418; 1 Younge & Collyer, 65; Story's Eq. Jur., Secs. 1202, 1203, and this presumption was not rebutted by any evidence which made it the duty of the referee to find that they were not so intended.

The judgment should be affirmed. All concur.

Judgment affirmed.[1]

[1] And see Illinois, Annot. Stats. (1913), Par. 4209, *ante*, p. 776; *Nelson* v. *Bush*, 9 Dana 104; Massachusetts, Rev. Laws (1902), c. 140, § 8, *ante*, p. 776; *Parsons* v. *Parsons*, 52 Ohio St. 470; Hughes's Appeal, 57 Pa. 179; *McLure* v. *Steele*, 14 Rich. Eq. 105; *Proud* v. *Turner*, 2 P. Wms. 560. But compare *Brown* v. *Taylor*, 62 Ind. 295; Louisiana, Rev. Civ. Code (1912), § 1240; *Skinner* v. *Wynne*, 2 Jones Eq. 41; Person's Appeal, 74 Pa. 121.

SECTION IX.

ACCOUNTS.

Stat. 31 Edw. III., c. 11 (1357). — Item, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; . . . (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come.

Stat. 1 Jac. II., c. 17, § 6 (1685). — Provided always, and it is hereby further enacted, That no administrator shall, . . . be cited to any the courts in the said last act mentioned,[1] to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof) unless it be at the instance or prosecution of some person or persons in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges by the said last act impowered and appointed to take the same, otherwise than is as aforesaid; anything in said last acts contained to the contrary notwithstanding.

WAINFORD *v.* BARKER.

1 Ld. Raym. 232. 1697.

UPON motion for a prohibition to the spiritual court of Norwich (where the plaintiff was cited as administrator to J. S. to account, etc., at the instance and prosecution of the defendant) upon a suggestion, that the defendant was not a creditor, nor next of blood, to the intestate. The question was, whether the defendant, who had a debt due to him from the intestate by simple contract, but more than six years were elapsed, whether he should be accounted a creditor within the statute of 1 Jac. 2, c. 17, § 6, to be enabled to compel the administrator to account. And adjudged, that he is a creditor within the act; for it is a debt, tho' barrable by pleading of the statute of limitations; and therefore the prohibition was denied.[2]

[1] The ecclesiastical courts. See Statute of Distributions, Stat. 22 & 23, Car. II., c. 10 (1670), *ante*, p. 772.

[2] This jurisdiction is preserved by the Court of Probate Act. Stat. 20 & 21 Vict. c. 77, § 23 (1857). But neither before nor after that act could an executor or administrator be cited *ex officio* by the ecclesiastical or the probate court. *Greerside* v.

DULWICH COLLEGE *v.* JOHNSON.

2 Vern. 49. 1688.

THE plaintiff's bill was for a discovery of a personal estate, that was devised to charities relating to the College. The defendant pleaded that the will was not yet proved, but was controverted in the spiritual court.

The court overruled the plea, a discovery of the estate being for the benefit of all persons interested therein, and necessary for the preservation thereof: and discoveries have often been ordered to be made *pendente lite* in the spiritual court. Vide *Wright* v. *Blicke, ante* 1 vol. 106; *Phipps* v. *Steward,* 1 Atk. 285, where demurrer on same ground overruled.

BROOKS, INFANT *v.* OLIVER.

Ambler 406. 1761.

PLAINTIFF being intitled to a very large real estate in Antigua, and to a personal estate there and in England, under the will of [Jonas Longford], brought his bill against defendant Oliver and others for an account; and it was prayed that Oliver, who was the only acting executor and trustee in England, and to whom the produce of the estate in Antigua was remitted, by the directions of the testator, might account annually by affidavit, instead of the usual way, which it was said would be a great saving to the infant's estate; and a precedent of such a decree was produced in the case of *Blair* v. *Drake,* 11th February, 1755,[1] where Lord Hardwicke directed, that the defendants Drake and Long should account for the estate and effects of the plaintiff Blair, the infant: and as often as any sum or sums belonging to the plaintiff, the infant, should come to their hands, by consignment of effects or remittance of money, it was further ordered, that the same be ascertained by the affidavit of the said defendants; and that, after all just allowances deducted thereout, the defendants do pay the clear surplus of what shall so come to their hands, by consignment or remittance, into the Bank, with the privity of the Accountant-General, etc. Thereupon his Honour made the like decree, with this addition, "*at the instance of the plaintiff,*" and by directing the account annually.

Benson, 3 Atk. 253; *Bouverie* v. *Maxwell,* L. R. 1 P. & D. 272. See Stat. 20 & 21 Vict., c. 77, § 87 (1857).

For many statutes in the United States compelling personal representatives to file accounts, see 2 Woerner, Am. Law of Adm. (2d ed.), § 501.

[1] Lit. Reg. 1754a, fo. 189.

MIX'S APPEAL.

35 Conn. 121. 1868.

CARPENTER, J.[1] On the 28th day of June, 1864, the appellant, as administrator on the estate of Joseph E. Webster, deceased, presented to the court of probate an administration account, which was intended as a preliminary, and not as the final account, in which he erroneously, and through mistake and inadvertence, charged himself with the whole of the personal property embraced in the inventory, only twenty-six eightieths of which belonged to the estate. In his final account he attempted to correct the mistake, by charging to the estate the sum of $419.85, that being the amount erroneously charged to himself in the first account. The court of probate refused to allow this item, and he appealed to the Superior Court. The Superior Court reversed the judgment of the court of probate, and decreed that that amount should be allowed the appellant. On the trial in the Superior Court the appellees objected to the evidence offered to prove the mistake, upon the ground that the decree of the court of probate, allowing the first account, was conclusive. We are not disposed to question the proposition that a decree of a court of probate, unless appealed from, is final and conclusive upon the parties, as to all matters within its jurisdiction which are necessarily involved in the issue. The question here is, whether this case falls within that principle. A distinction is to be observed between orders and decrees made during the settlement of an estate, which are merely *preparatory* to a final settlement and distribution, and a final decree adjusting and closing an administration account. The latter only possesses the elements of a final judgment; the former are preliminary, and subject to change or modification, as the exigencies of the case and the demands of justice may require. We believe the practice has been, and now is, for the court of probate, in adjusting the final account, to rectify all mistakes in the prior proceedings. Thus property embraced in the inventory which belongs to other parties is charged to the estate in the administration account, and no probate judge hesitates to allow it. No one will seriously contend that the decree of the court accepting the inventory is conclusive upon the administrator as to the title of all the property therein named. If an administrator, in making a return of sale of real or personal property, makes a mistake in the amount realized, we know of no principle prohibiting the court of probate from rectifying the mistake in the settlement of the administration account. We cannot see why the court should not apply the same rule to a mistake in a mere preliminary statement of an account, especially if it is not intended by the administrator, nor regarded by the court, as a final account.

[1] A portion of the opinion is omitted.

Courts of probate, as to all matters within their jurisdiction, are clothed with chancery powers, so far as may be necessary to enable them to do full justice between the parties. As a court of chancery will, in passing a final decree, correct mistakes, if any, in the interlocutory orders and decrees, so will a court of probate, in furtherance of justice, correct mistakes in its prior proceedings. We ought not therefore to give the decree in question the force and effect of a final decree. For these reasons we think the superior court did right in admitting evidence to prove the mistake. . . .

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.[1]

McCULLY *v.* LUM, EXECUTOR.

49 N. J. Eq. 552. 1892.

ON appeal from an order of the Passaic county orphans court disallowing exceptions to the executor's account.

THE ORDINARY. John Lum died December 21, 1881. His will was admitted to probate by the surrogate of Passaic county in January, 1882, when James Lum, the executor thereof, assumed the duties of that office. In April, 1883, the executor accounted for his administration of the estate, and the estate was then settled save in one particular. By the third paragraph of the will Caroline McCully, the testator's sister, was given, for her life, the use of $3,000, which was then invested upon the security of a farm of about sixty-two acres, belonging to William Robinson, of Swift Creek, Virginia; and it was provided that, at her death, the principal sum should be divided among certain of the testator's nephews and nieces, among whom was the wife of William Robinson. Mrs. Robinson, however, was not to take a share of the $3,000 unless her husband should pay his indebtedness. Payment of the indebtedness was secured by a trust deed — a form of security in use in Virginia — which bore date on the 31st of October, 1871, and required the payment of Mr. Robinson's bond for $3,000, with interest at the rate of eight per cent. per annum, in twelve months after the date of

[1] Generally the effect of periodical accounting is *prima facie* merely. Such accounts may be attacked at a later period before final settlement. *Smith* v. *Smith*, 13 Ala. 329, 335; *Bliss* v. *Seaman*, 165 Ill. 422, 428; *Goodwin* v. *Goodwin*, 48 Ind. 584; *Glessner* v. *Clark*, 140 Ind. 427; *Heath's Estate*, 58 Iowa 36; *Sewall* v. *Slingluff*, 62 Md. 592; *Field* v. *Hitchcock*, 14 Pick. 405; *Clarke* v. *Sinks*, 144 Mo. 418; *Bachelor* v. *Schmela*, 49 Neb. 37; *Grant* v. *Hughes*, 94 N. C. 231; *Ingraham* v. *Rogers*, 2 Tex. 464; *Kyles* v. *Kyle*, 25 W. Va. 376. Compare *Lovewell* v. *Schoolfield*, 217 F. R. 689.

Illustrations that the allowance of an account after notice is conclusive are *Estate of Fernandez*, 119 Cal. 579; *Peckard* v. *Price*, 5 Del. Ch. 252, 258; *Appeals of Fross and Loomis*, 105 Pa. 258, 268. And see *Duke* v. *Duke*, 26 Ala. 673; *Mercer* v. *Hogan*, 4 Mack. 520; *Cummings* v. *Cummings*, 128 Mass. 532; *Morton* v. *Johnson*, 124 Mich. 561.

the deed, that is, on the 31st of October, 1872, providing that if default should be made in the payment it should be the duty of the trustee, who was James Lum, when required to do so, to make sale at public auction of the property conveyed upon ten days' advertisement in a newspaper of Petersburg, Virginia.

When James Lum entered upon his executorship this investment existed.

William M. Robinson, the debtor, was the superintendent of a cotton factory and also a minister of the gospel. He lived upon the mortgaged premises with his wife and family. Until 1885 he regularly paid the interest upon his debt, at six per cent. per annum, to which the executor, apparently without objection upon the part of his *cestui que trust*, had reduced it. In the spring of 1885 the cotton mill failed, and with its failure Robinson became bankrupt. Then he ceased to pay the interest upon his indebtedness, but leased the farm and collected the rents, and, after paying the yearly taxes and insurance, turned over the entire balance of income to the executor. It then appeared that the property was not worth the encumbrance upon it, and that it could not be sold for sufficient money to realize the $3,000. The conduct of Mr. Robinson virtually put the executor in possession of the encumbered property, securing him the income without expense in its collection, and the executor held it in this manner until the spring of 1890, in hope that it could be advantageously sold. The highest price ever offered for it was $1,500, and this offer Mr. Robinson communicated to the executor, suggesting that he would add to it his own note for $1,000, the interest of which, he thought, his children would pay. There is no evidence that Mr. Robinson's children joined in this suggestion or were willing to put themselves under obligation to pay the interest. The note appeared to the executor to be a valueless addition to the $1,500, and that price appeared to him to be so small that he refused to accept it.

In the spring of 1890 Mr. Robinson died, and the executor then sold under the power contained in the trust-deed. The sale was managed by E. S. Robinson, a son of William Robinson, who was a lawyer in Petersburg. It appears that there were only three bids at the sale — one by a stranger, one by the executor for $1,400, and the third and final bid by the brother of the lawyer who conducted the sale, for $1,500, to whom the property was struck down. The wife of William Robinson is the executor's sister, and the lawyer who conducted the sale and the purchaser who bought at the sale were his nephews, and, as well, the sons of the deceased debtor. The result of the sale was, that the property was retained in the Robinson family.

The executor paid his lawyer-nephew, E. S. Robinson, $100 for his services in the foreclosure, in addition to $9.50, the expense of advertising the sale of the property, and $37.50 auctioneer's fees.

Besides, he asks allowance for $60, his personal expenses in attending the sale, making the entire expense of the sale $207, which, deducted from the $1,500 bid for the property, leaves the fund $1,293.

After the sale the executor again accounted, charging himself with all the interest received from William Robinson and all the income had from the farm, together with the $1,500 realized at the sale of the farm, and praying allowance for the same interest and income paid over to Caroline McCully, and the $207, expense of the sale. To this account the appellant filed exceptions on the ground that the executor did not charge himself with all the interest due upon Robinson's bond and with the whole principal sum of $3,000.

The appellant undertook the burden of maintaining her exceptions, and called the executor as a witness and examined him, resting her case substantially upon his testimony.

I think that the form of the account was wrong. The accountant should have charged himself with the whole $3,000 and the interest and income actually received, and should have prayed allowance for loss in principal through the inadequate value of the property upon the security of which it was invested.

Although I have not the account of 1883 before me, I presume it exhibits a balance, which includes this $3,000. Whatever else there was in the balance, I presume, was distributed immediately after the former accounting. By that accounting the executor was chargeable with the $3,000. The present account should have started with the balance upon that accounting, from which the executor had not been discharged.

For this reason, I think that the exception that he did not charge himself with the $3,000, in matter of form, was well taken and should have been allowed.

Such a charge would have thrown the burden of proving the discharge he was obliged to ask for upon the executor. The form of accounting adopted invited an exception which would charge the executor, and, bearing in mind the rule that in matters of charge the burden of proof is with the exceptant, and in matters of discharge the burden of proof is with the accountant, it is perceived that the effect of the form was advantageous to the executor in throwing the burden of proof, improperly, upon the exceptant. The proper course of the exceptant, in such a situation, was to demand, under her exception, that the account be restated in proper form, so that the accountant should be put to the proof of the allowances he needed. I think that now the account should be restated in this shape, and that I should regard the accountant as having the burden of proof.

But the inquiry already had is not wholly useless. The proofs satisfy me that the executor should not be held responsible for any loss by reason of the depreciation of the value of the encumbered property. I am unable to perceive how more could have been realized for the property by sale of it before 1890. It is true, between

the testator's death and 1885, William Robinson was not known to be bankrupt, but it does not appear that anything could have been recovered from him by suit upon the bond. He is shown to have been burdened with a family and to have been in receipt of a very small income. The *cestuis que trust* evidently, without apprehension of loss, acquiesced in the continuance of the loan to the time of the failure. Under all the circumstances surrounding the loan, and in view of the character and pursuits of Mr. Robinson and the relationship of all parties, debtor, *cestuis que trust* and trustee, I think it would be an unjustifiable hardship to charge the executor for failure to collect the mortgage before 1885. It is quite clear that after 1885 the property had little market value, and that the executor, in the *bona fide* exercise of his judgment, delayed its sale in the hope that something would transpire which would enable him to realize a larger price than $1,500 for it. It was in the exercise of such judgment that he, at one time, refused to sell for $1,500 and the note of the bankrupt Robinson for $1,000.

The only part in his conduct with which I am not satisfied is the ultimate sale of the property. He sold it under the guidance of a nephew, who, by his correspondence, appears to have misrepresented the law to the executor, and to have been unfriendly to the trust, and so interested as to be an unfit adviser and attorney. It has been shown how extensively the sale was advertised; what the attendance at it was; what effort was put forth to obtain the full value of the property, and what portion of the fair value of the property was in fact obtained. The executor should have been required to make complete and full disclosure in these respects, not only by his own oath, but also by corroborative proofs beyond all suspicion of bias or interest and entitled to the court's full credence. He should have shown that ample publicity was given to the sale, and that it was so fairly conducted that the fair value of the property was obtained. I judge, from the proofs, that there was no other advertisement than that which the strict compliance with the conditions of the trust required, and I am, I think, by the meagre disclosures concerning the sale, made justly suspicious that it was conducted so that the land might be bought in by a member of the Robinson family. Indicia of a collusive sale exist, which the executor should be required to explain by the clearest and most satisfactory proof, so that it shall plainly appear that the sale was so conducted as to subserve the best interest of his trust and realize the fair value of the encumbered property, and not so as to put the title of the land in his sister's son for less than its value.

I will reverse the order of the orphans court disallowing the exceptions, and send this matter back to that court that the account may be restated in the manner I have suggested.

To the restated account, an exception must be permitted which will require the executor to prove the character of his sale in the

particulars I have indicated. The charge of his dereliction of duty in other respects will be regarded as adjudicated. Question as to allowance of commissions must await the finding in regard to the sale.

There will be no costs allowed upon this appeal.[1]

[1] "The correct form is to charge the accountant with the amount of the inventory and appraisement of personal property, and all moneys received since filing the same, from debts due decedent, not inventoried, together with any excess over the appraised value realized by a sale of the personal property, or any portion thereof, and any proper surcharges either admitted or duly proved. Credit is then to be allowed for preferred debts, expenses of administration, allowance to the widow or children, if claimed, loss upon appraisement by sale, and debts of decedent if undisputed and estate solvent. The true balance for distribution will thus appear." — *Per* HANNA, J., in *Estate of Squire*, 11 Phila. 110, 111.

SECTION X.

REFUNDING. LIABILITY OF THE ESTATE AFTER FINAL SETTLEMENT.

ROGERS *v.* WEAVER.

5 Ohio 536. 1832.

ASSUMPSIT for money had and received. The defendant was a creditor of an intestate estate, and the plaintiff the administrator. The plaintiff, supposing the estate solvent, had paid the defendant several sums upon his demand, but upon the final settlement with the Court, found the estate insolvent, and that he had paid the defendant more than his distributive share. Having given the defendant notice and demanded repayment of the overplus, and being refused, the plaintiff brought this suit to recover it. The parties had once arbitrated this dispute, and obtained an award, but afterwards had agreed to set the award aside, and to submit again, which had not been done.

O. Parish, for defendant, objected that the plaintiff could not recover:

1. Because the plaintiff paid the money at his peril, being chargeable with knowledge of the situation of the estate.

2. Because he paid as administrator, and seeks to recover back in his individual right.

3. Because the parties are concluded by the arbitration and the agreement for a second submission is void because procured from defendant by threats.

Wilcox, for plaintiff, cited 3 Ohio, 513.

WRIGHT, J., delivered the opinion of the Court.

The facts in this case are agreed, and we are to apply the law to the facts. It is an admitted rule, that when money has been paid *by mistake,* it may be recovered back in this action. It appears to us the payment in this case was made under a mistaken understanding of the true situation of the estate. The administrator was under no obligation to pay before the true situation of the estate was ascertained; and if he paid to accommodate creditors, he had a right to require security to refund, if it turned out the sum paid was more than the creditor's dividend. In case suit is brought, the law provides that administrators shall only be liable for assets, and that too, notwithstanding he may never have got into legal difficulty by negligence, or false pleading. 29 Ohio L. 255. — 5 Ohio, 87. This Court has determined that if an administrator prefer one creditor to another, the amount overpaid was, as to other creditors, assets in his hands. 5 Ohio, 87. Even upon a forthcoming bond, by an

administrator, it has been held in Virginia that if afterwards it turned out that the estate was insolvent, by the exhibition of new claims, the administrator was only liable for the distributive share of the assets. 1 Rand. 421. We think it just and equitable as well as lawful, to infer a promise to repay the sum received more than was due, from the fact of its receipt through mistake.

The suit is correctly brought by the plaintiff in his individual character. He is personally responsible to other creditors, and should have a corresponding right to receive the amount. 17 Mass. 380.

The question upon the award is not without difficulty. If it remains in force, it is conclusive against the plaintiff. But the agreed case admits that the parties after the award *agreed to submit the controversy anew*. We think this vacates the first submission and award. The submission gives validity to the award. 3 Ohio 513. It is, however, said this last assignment was procured by the plaintiff by threatening suit, and so has no legal efficacy. A threat could not affect the obligation, except it amounted to duress. That is not pretended in this case.

Judgment for plaintiff.[1]

ANONYMOUS.

1 Vern. 162. 1683.

A. BEING indebted unto B. makes C. his executor. C. wastes the estate and dies, and makes D. his executor, and by his will devises several legacies. D. pays the legacies. B. exhibits a bill against D., the executor of C., for his debt due from the first testator, and against the legatees in the will of C., to compel them to refund their legacies, there not being now sufficient assets of the first testator.

Decreed that the legatees should refund.[2]

[1] *Mansfield* v. *Lynch*, 59 Conn. 320 (*semble*); *Wolf* v. *Beaird*, 123 Ill. 585; *East* v. *Ferguson*, 59 Ind. 169; *Tarplee* v. *Capp*, 25 Ind. App. 56; *Morris* v. *Porter*, 87 Me. 510; *Walker* v. *Hill*, 17 Mass. 380; *Heard* v. *Drake*, 4 Gray, 514; *Thorson* v. *Hooper*, 57 Oreg. 75, *accord*. *Carson* v. *M'Farland*, 2 Rawle 118; *Findlay* v. *Trigg*, 83 Va. 539; *Staples* v. *Staples*, 85 Va. 76, *contra*. Compare *Rhodes* v. *Driver*, 108 Ark. 80; *Beardsley* v. *Marstellar*, 120 Ind. 319; *Lawson* v. *Hansborough*, 10 B. Mon. 147; *Brooking* v. *Farmers' Bank*, 83 Ky. 431, 435; *Moore* v. *Moore*, 88 Ky. 683; *Woodruff* v. *Claflin Co.*, 198 N. Y. 470; 19 Am. & Eng. Ann. Cas. 794 note.

[2] Laches as affecting the creditor's right. *Ridgway* v. *Newstead*, 3 De G. F. & J. 474; *Blake* v. *Gale*, 32 Ch. D. 571; *In re Eustace*, [1912] 1 Ch. 561. *See Shelburne* v. *Robinson*, 8 Ill. 597; *Ely* v. *Norton*, 1 Halst. 187; *Montgomery's Appeal*, 92 Pa. 202. The defendant's change of position. *Brooking* v. *Farmers' Bank*, 83 Ky. 431; *McClung* v. *Sieg*, 54 W. Va. 467, 475, *post*, p. 818; *Ridgway* v. *Newstead*, 3 De G. F. & J. 474, 487. The creditor's right against a *bona fide* purchaser from distributee. *Berton* v. *Anderson*, 56 Ark. 470; *Hoffman* v. *Armstrong*, 90 Md. 123.

DAVIS *v.* DAVIS.

8 Vin. Abr. 423, pl. 35. 1718.

BILL by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the *assets falling short to satisfy the testator's debt.* Decreed that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket stands in the place of the creditor, and has the same equity against a legatee to compel him to refund, *contra* to the opinion in 2d Vent. 358. *Noell* v. *Robinson*, and 2 Vent. 360. *Hodges* v. *Waddington*. *Per* JEKILL, M. R. MS. Rep.[1]

ZOLLICKOFFER, EXECUTOR *v.* SETH, ADMINISTRATOR, AND OTHERS.

44 Md. 359. 1875.

ALVEY, J.,[2] delivered the opinion of the Court.

The questions in this case arise upon a demurrer to the complainant's bill, and by the demurrer the facts alleged are admitted to be true. If, therefore, the bill discloses a case to entitle the complainant to relief, the decree appealed from must be reversed, and the cause remanded for further proceedings in the Court below.

The right of the complainant to recover from the defendants, or any of them, will depend upon the decision of the two following propositions:

1. Whether, by reason of the death of McHenry Grafton, and the full administration of his estate by his personal representative, his obligation upon the administration bond of Alexander H. Seth and John M. Frazier, in which Coates and Grafton were co-sureties, ceased and became extinguished not only as against his personal representative, but also as against his legatees and distributees, who have received his personal estate upon final administration by the executor.

2. The complainant, as executor of Coates, having paid the legacies under Robert Seth's will, after the administration and distribution of the personal estate of McHenry Grafton. Whether he, the complainant, is entitled to relief for contribution as against the legatees or distributees of the estate of Grafton, in respect to the distributions made to them under the will of their testator?

1. The administration bond, upon which Coates and Grafton were co-sureties, was given in 1865. Alexander H. Seth, the surviving administrator, with the will annexed, of Robert Seth, is and

[1] See *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

[2] The statement of facts and part of the opinion are omitted.

has been for a long time past utterly insolvent; and John M. Frazier, the other administrator and principal in the bond, died in 1870, also insolvent, and before the estate of Robert Seth was fully administered. Grafton, the co-surety with Coates, died in April, 1867, leaving considerable estate, and by his will disposed of his property to his mother and brothers and sisters, and appointed John M. Frazier and Thomas L. Hall his executors. Coates died in September, 1871, leaving a will wherein the complainant was made executor.

In October, 1870, Hall, the surviving administrator of Grafton, settled in the Orphans' Court his second and final account, showing that the personal estate of the testator had been fully administered, and thereupon passed over the property to the parties entitled to receive it under the will of the deceased.

In October, 1873, Alexander H. Seth, as surviving administrator of Robert Seth, passed an account in the Orphans' Court, showing certain balances due to the residuary legatees under the will of his testator; and very soon thereafter suits were instituted on the administration bond, at the instance and for the use of some of such legatees, against the complainant as executor of Coates, and also against Alexander H. Seth, the surviving administrator, and against the executrix of Frazier, and also against Hall, the surviving executor of Grafton. In these suits recoveries were had as against the complainant; but, as against Seth, the judgments were unavailing, because of his insolvent condition, and as against Frazier's executrix there were no assets to be bound by judgment, and Hall, as the surviving executor of Grafton, successfully resisted recovery against him, on the ground that he had fully administered the estate of his testator before he was notified of the claims. Consequently, the complainant, as executor of Coates, was required and did pay, in 1874, not only the legacies for which judgments were recovered, but other legacies for which the bond was bound, amounting in the whole to the sum of $4765.

Upon the facts, as detailed in the bill, the complainant prays that the legatees or distributees of the estate of Grafton may contribute their respective proportions to reimburse him, as the executor of Coates, to the extent of one-half of the amount which he has been required to pay to the legatees under the will of Robert Seth.

This application is resisted upon the ground that the estate of Grafton is entirely and completely exonerated from any and all obligation created by the bond, by reason of the death of Grafton and the full administration of his estate before the existence of the claims was notified to his executor, and that, consequently, there is no right of contribution that can be maintained by the complainant as against the legatees or distributees of the co-surety's estate.

That the executor of Grafton was exonerated, if he fully administered the estate and paid it over to the legatees or distributees

without due notice of the claims, and after giving the notice by advertisement as required by the statute, may readily be conceded. The Code, Article 93, Sec. 109, provides, that "In case all the assets have been paid away, delivered or distributed as herein directed, and a claim shall afterwards be exhibited, of which the administrator hath not notice by the exhibition of the claim legally authenticated, as herein required, *he shall not be answerable for the same;* and if he be sued for any claim, and shall make it appear to the Court in which suit is brought that he hath so paid away, delivered or distributed, and the plaintiff cannot prove that the defendant had notice as aforesaid before such payment, delivery or distribution, the Court shall not proceed to give judgment (although the amount of the claim against the deceased may be ascertained), until the plaintiff shall be able to show further assets coming into the defendant's hands," &c. And again, by section 119 of the same Article of the Code, it is provided, that "Whenever it shall appear by the first or other account of an executor or administrator, that all the claims against or debts of the decedent, which have been known by or notified to him, have been discharged or allowed for in his account, it shall be *his duty* to deliver up and distribute the surplus or residue as directed; provided, that his power and duty with respect to future assets shall not cease; and after such delivery he shall not be liable for any debt afterwards notified to him; provided, he shall have advertised as hereinbefore directed," &c. The succeeding section of the same Article of the Code prescribes the form of the notice to be given to the creditors of the deceased.

The law is very explicit, as it appears from the sections of the Code recited, in providing for the exoneration of the executor, upon his observing certain precautions; but it is to be noticed and borne in mind that it is the executor or administrator personally that is to be exonerated and discharged, and not the estate of the decedent. It is nowhere declared or intimated that there should be no remedy for a creditor who may have failed to authenticate and notify his claim to the executor, before final administration; or that, if the creditor's claim be not ascertained or provable before such final settlement and distribution, he should be without remedy, notwithstanding his debtor's assets may be shewn to be abundant, simply because the executor or administrator may have delivered them over to legatees or distributees. It would be strange, indeed, if such were the provisions of the law. What would be the predicament of an absent creditor, who might be totally ignorant of either the death of his debtor, or of the administration of his estate? What would become of parties dependent for their protection and security upon official bonds, guardian bonds, trustees' bonds, and the like, where the breach has not occurred, or, if occurred has not been ascertained at the time of the final settlement and distribution of a surety's estate, if the position of the defendants in this case be

sustained? Surely the law never contemplated the total discharge of the deceased surety's obligation in all such cases. In this case, the amounts for which the bond was ultimately liable were not ascertained until October, 1873 — about three years after the final settlement and distribution of Grafton's estate. Until these amounts were ascertained, and actually paid by the complainant, as the co-surety Coates, there was no claim provable by him against the estate of Grafton. No *laches* therefore can be imputed to him in not exhibiting the claim for contribution before distribution of Grafton's estate by his executor.

In England, as is well known, prior to Lord St. Leonards' Act, 22 and 23 Vict., c. 35, it was the established practice for administrators and executors to administer their estates under the orders and decrees of the Court of Chancery, and one great object in resorting to that jurisdiction by the executor or administrator was to obtain indemnity and protection against all future liabilities after final settlement. The creditors were required to come in and prove their claims under the decree, just as they are required to come in and prove their claims under the notice given by the executor or administrator by the order of the Orphans' Court, in our practice. Those failing to come in and prove their claims before final settlement and distribution of the estate, lost their remedy against the executor or administrator, but not as against the legatees or distributees. The same exoneration of the executor or administrator afforded in England by the decree in chancery is provided for with us by statute.

In the case of *Waller* v. *Barrett*, 24 Beav. 413, an administration suit, Lord Romilly, the Master of the Rolls, in speaking of the effect of the omission of the creditor to come in and prove his claim under the decree, said: "In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the Court having administered the assets protects the executors against all future claims. The creditor, however, is not left without his remedy, but that remedy is not against the executor. That principle is so fully established in this Court, that it is unnecessary to cite many authorities on the subject; but this is what Lord Eldon says in *Gillespie* v. *Alexander* (3 Russ. 136), on the subject. 'If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all.'" The authorities are exceedingly numer-

ous upon this subject, all maintaining the same general doctrine, several of which are referred to by the Master of the Rolls, in *Waller* v. *Barrett*, and, among others, he refers to the case of *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122, in which Lord Cottenham said: "Where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in this Court, he does it at his own risk." And to refer again to the case of *Waller* v. *Barrett*, the Master of the Rolls, in another part of his opinion, made these observations: "I am at a loss to conceive on what principle a debt which may arise *hereafter*, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time; he may be ignorant of the whole proceedings, and yet if he do not come in and claim, his only remedy in this Court is against the legatees." And in the case of *March* v. *Russell*, 3 Myl. & Cr. 31, referred to in argument, Lord Chancellor Cottenham treated the doctrine as one of the oldest and best established of the Court. He there said: "That a creditor may follow assets in the hands of the legatees to whom they have been delivered in ignorance of the creditor's demand has been an established principle of this Court from the earliest period, of the decisions in which we have any traces." And in accordance with these, and many other authorities maintaining the same general principle, Mr. Justice Story has stated the doctrine as one as firmly established as any in the equity jurisprudence of the country. In Vol. 2, *Eq. Juris.*, Sec. 1251, the learned author says: "But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a *clear right in equity*, in such a case, to follow the assets of the testator into their hands, as a trust fund for the payment of his debt. The legatees and distributees are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets after all the debts are paid." This just and equitable doctrine formed a part of the system of jurisprudence implanted here from the mother country, and there is nothing in our testamentary system that at all militates against its continued operation. Indeed, it has been fully recognized by this Court in the case of *Kent* v. *Somervell*, 7 Gill & John. 265, 270, and has been applied and acted on in the case of *Hanson* v. *Worthington*, 12 Md. 418, with respect to a legacy erroneously paid. See, also, *Somervell* v. *Somervell*, 3 Gill, 276.

Now, in England, by Stat. 22 and 23 Viet. c. 35, Sec. 29, very much the same kind of notice by advertisement is required to be given to creditors to produce their claims to the administrator or executor, as that required to be given by our Code. It is provided that at the expiration of the time named in the notice for sending in such claims, the executor or administrator shall be at liberty to

distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has notice, and shall not be liable for the assets, or any part thereof, so distributed, to any person of whose claim such executor or administrator shall not have had notice at the time of distribution. But it is declared that nothing in the Act shall be taken in any manner to prejudice the right of the creditor to follow the assets so distributed into the hands of the persons to whom distribution may be made; the object and design of the Act being to avoid the expense and delay attending administration suits, and to afford to the executor or administrator the same protection that he would have under a decree in chancery. *Clegg* v. *Rowland*, L. R. 3 Eq. Cas. 368. This same protection was designed by the sections of the Code to which we have referred, and hence, by the terms of the statute, only the executor or administrator is exonerated from liability upon final administration of the assets, and not the estate or those to whom it has been distributed. That such was the design of the statute is made apparent by comparison of Section 108, of Art. 93, with the sections of the same Art. to which we have heretofore referred. By the Sec. 108, if a claim be exhibited, and it be rejected or disputed by the executor or administrator, he is allowed to retain assets to pay it, provided it be established; but those assets are made liable to other claims, or to be delivered up on distribution, in case the claim retained for be not established; "and if on any claims exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, *the creditor shall be forever barred.*" By this provision, not only is the executor exonerated, but he is required to pay out or distribute the money retained, and the creditor is forever barred all right of recovery against the assets of the estate, no matter in whose hands they are found. No such bar or preclusion is provided in terms with reference to any claim that has not been exhibited, or which, in the nature of things, could not have been exhibited, before final administration; and hence it may well be concluded that no such bar or preclusion was ever intended with respect to such claims.

If, however, a party has a probable claim against an estate, and without sufficient cause, neglects to prove and exhibit it to the executor in due time, it may be that, in any subsequent attempt to pursue the assets in the hands of legatees or distributees, he will be successfully met with the defence of *laches*. That is a defence that depends upon the particular facts and circumstances of each case as disclosed. Here, as we have said, there is no ground for such a defence. . . . *Decree reversed, and cause remanded.*[1]

[1] In the following cases where there was a misapprehension of facts the personal representative was allowed to compel a refund from legatees or distributees for the benefit of creditors. *Alexander* v. *Fisher*, 18 Ala. 374; *Stokes* v. *Goodykoontz*, 126

NEWMAN *v.* BARTON.

2 Vern. 205. 1691.

THE question being whether an executor should compel a legatee to refund. And the case of *Grave and Bainson* cited, where one legatee being paid in full his whole legacy, and there wanting assets to pay the other legacies, it was decreed for the benefit of the unsatisfied legatees, that the legatee who had received his full legacy, should refund, and be paid only in proportion; and the case of *Hodges and Waddington,* where a creditor compelled a legatee to refund.

PER CURIAM. A creditor shall follow the assets in equity, into whosesoever hands they come. But where the executor had voluntarily paid the full legacy, and afterwards assets proved deficient to pay the other legacies, they conceived neither the executor,[1] nor any of the other legatees should compel him to refund; but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded.

WALCOT *v.* HALL.

1 P. Wms 495 note. 1788.

J. PEARCE by will gave to the plaintiff £50 to be paid to him at his age of 21 years, or day of marriage, the same to be put out at interest in the name of his executor, Charles Pearce Hall, &c. He then disposed of the residue, and appointed C. P. Hall executor. Hall proved the will, retained the £50 for the plaintiff's legacy, and paid over the residue to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of 21 filed this bill against the executor and the residuary legatees for payment of the legacy. His Honor [SIR LLOYD KENYON, M. R.] said the residuary legatees could not be liable; that the distinction was between the cases, where there was originally a deficiency of assets, and where the executor had wasted them; in the former case, a legatee, who had been paid more than his proportion, must refund to the others; but here the residuary legatees had received no more than they were entitled to, and the

Ind. 535 (*semble*) (compare *Smith* v. *Smith*, 76 Ind. 236); *Buchanan* v. *Pue*, 6 Gill 112; *Lewis* v. *Overby*, 31 Gratt. 601, 622. But in the following cases the executor or administrator had to show that he acted prudently in making the payment. *Clifton* v. *Clifton*, 54 Fla. 535; *Clark* v. *Truslow*, 146 N. Y. Supp. 750; *Donnell* v. *Cooke*, 63 N. C. 227; *Clark* v. *Williams*, 70 N. C. 679; *McEndree* v. *Morgan*, 31 W. Va. 521, 531. See *Harris* v. *White*, 2 South. 422; *Edgar* v. *Shields*, 1 Grant 361.

[1] *Moore* v. *Lesueur*, 33 Ala. 237; *Orr* v. *Kaines*, 2 Ves. Sr. 194, *ante*, p. 496 (*semble*), *accord*. *Gallego* v. *Attorney General*, 3 Leigh 450, 488, *contra*. And see *Culbreath* v. *Culbreath*, 7 Ga. 64; *Smith* v. *Smith*, 76 Ind. 236; *Uffner* v. *Lewis*, 27 Ont. App. 242.

executor was therefore the only person to be resorted to. And his Honor, being of opinion that this demand, as against the executor, was barred by his certificate, dismissed the bill. *Sed vide Orr* v. *Kaimes*, 2 Vez. 194.[1]

DAVIS AND OTHERS *v.* NEWMAN.

2 Rob. (Va.) 664. 1844.

ALLEN, J.[2] The testator, after making large specific bequests, directed the residue of his estate to be divided into six parts, of which the executor was to have one, and the remaining five were divided among his children and grandchildren. He owed no debts, and the executor proceeded to make sundry payments to the five legatees. The payments were voluntary; but, as it is alleged, were made under a mistake of fact as to the value of the assets. When the money was paid, all parties supposed that a bond given by Thomas Macon to the testator in his lifetime for a large amount, was good and would be collected; and the executor, in settling with the legatees, acted under that impression. The bond has turned out to be unavailing. Macon, though in the possession of an immense estate at the testator's death, was in truth greatly embarrassed, and subsequently gave deeds of trust which exhausted all his property. There being no creditors of the testator, the executor now seeks to recover back for his own benefit the sums overpaid to the legatees.

In 1 Roper on Legacies 315, it is said to be a rule in equity, to presume, when an executor voluntarily pays one or more legacies, that he has received sufficient assets to discharge the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since he will not be permitted to institute proceedings (except in particular instances) against the legatees so paid, to oblige them to refund. See also 2 Lomax's Digest 173. 2 Williams on Ex'ors 892. 1 Eq. Ca. Abr. 239. The cases referred to by Roper of *Noel* v. *Robinson*, 1 Vern. 94, *Newman* v. *Barton*, 2 Vern. 205, *Coppin* v. *Coppin*, 2 P. Wms. 292, and *Orr* v. *Kaines*, 2 Ves. Sen. 194, seem to me fully to sustain the position that in England, where the executor has made a voluntary payment, he cannot compel the legatee to refund: though there may be good reason to doubt whether they fully justify the position that such payment is an admission of assets sufficient to pay all the rest of the legatees, and that, though the fact may be otherwise, equity will not admit evidence to that effect. The au-

[1] And see *Lupton* v. *Lupton*, 2 Johns. Ch. 614; *Buffalo Trust Co.* v. *Leonard*, 154 N. Y. 141, 146; *Anon.*, 1 P. Wms. 495; *Fenwick* v. *Clark*, 31 L. J. Ch. 728; *Peterson* v. *Peterson*, L. R. 3 Eq. 111.

[2] The statement of facts and part of the opinion are omitted.

thority for this proposition is the opinion of Sir John Strange, Master of the Rolls, in 2 Ves. Sen. 194. That opinion has been reviewed by President Tucker in *Gallego's ex'ors* v. *Attorney General,* 3 Leigh 488, and he there shews that Sir John Strange merely says such payment furnishes a presumption of the sufficiency of assets to pay the rest of the legacies, but does not say the presumption is conclusive. In the opinion of President Tucker, such presumptions, like all others, are liable to be rebutted, and although an executor may have been willing to encounter the hazard of paying one, it furnishes no reason for being compelled to pay the rest out of his own pocket.

I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications. In England, the executor is personally bound if he fails to plead. A judgment against him on any plea except *plene administravit,* or a plea admitting assets to a sum certain and *riens ultra,* is conclusive on him that he has assets to satisfy such judgment. Our statute (1 R. C. p. 384, c. 104, Sec. 36) has altered the law in this respect, and a failure to plead, or mispleading, subjects him to no personal responsibility. To hold that a voluntary payment to one legatee is an implied admission of assets sufficient to pay all would be giving to such implied admission *in pais* an effect to which the statute has declared an admission on record shall not be entitled. For, by any other than the plea of *plene administravit,* he was held to admit assets. 1 Wms. Saund. 335, note 10.

But as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment if voluntarily made. And no case has been cited which shews that such a bill has ever been sustained in England. It is certainly not shewn by those cited from 1 P. Wms. 495, and 2 P. Wms. 447. In Virginia the question has never arisen. *Burnley* v. *Lambert,* 1 Wash. 308, was a suit by the legatee to recover slaves bequeathed to him, and which had been seized and sold on an execution against the executor after he had assented to the legacy. Judge Pendleton, after deciding that the assent of the executor to the legacy vested the legal title in the legatee, which could not be divested at law by the creditor, remarks that the creditor is not without remedy; he may follow the assets in the hands of the legatee, or proceed against the executors, in which case the executors have their remedy in equity to compel the legatee to refund. It does not appear from the report, whether the debt was one of which the executor had no previous notice; and it was unnecessary for the court to enquire into that matter. If it was a debt of which he had no notice before paying away the assets to legatees, he had a right to compel the legatees to refund. *Nelthrop* v. *Biscoe,* 1 Ch. Cas. 135. And as the

assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies (1 Vern. 162), there might be good reason for holding that where the executor paid a legacy with notice of a debt, believing the assets to be sufficient, and they proved insufficient to pay both, he should be permitted to compel the legatee to refund. The legatee takes subject to the liability of being compelled to refund at the suit of a creditor. And where the executor has not been culpable, and is compelled to pay the debt, it seems to me he should be substituted to the rights of the creditor he has paid. So far the strict rule of the English courts might properly be relaxed in conformity with the more liberal spirit of our legislation in regard to executors, and with the principles which led the court to give relief in *Miller's ex'ors* v. *Rice* &c. 1 Rand. 438.

Jones v. *Williams*, 2 Call 102, was a controversy about accounts, and the question could not have arisen; for the money advanced to the distributee was advanced as a loan, to be returned if on a settlement he was not entitled to it; and for that reason the executor was allowed interest on the sum decreed to him.

Bower's ex'or v. *Glendening* &c. 4 Munf. 219 decides merely that an executor against whom a creditor obtains a decree may compel the legatee to refund.

In *Gallego's ex'ors* v. *Attorney General*, 3 Leigh, 450, it was decided that where the estate proved deficient by an unexpected depreciation of the property after some of the legatees were fully paid, the unpaid legatees have a right to look to the executors for their ratable proportions of the fund, and are not bound to have recourse to the legatees who were fully paid to compel them to refund. In England, the unsatisfied legatee cannot maintain a suit against the legatee fully paid to compel him to refund, if the executor is solvent. Such Judge Tucker lays down to be the rule; and therefore, though he was of opinion in *Gallego's ex'ors* v. *Attorney General* that the executors were liable only for the ratable proportion of the legacy, and not for the whole, upon the ground that payment in full to one was an admission of assets sufficient to pay all, he still held that, as the executors were quite solvent, the legatees had no right to call upon those paid to refund. The case did not call for a decision on this point, and the other judges did not notice it. If, as I conceive, the executor who has been made liable at the suit of the creditor can only be permitted to compel the legatee, whom he has voluntarily paid, to refund, by substituting him to the rights of the creditor, who could have proceeded in the first instance against the assets; where it is shewn that no such original right to charge the assets exists, there is no right to which the executor can be substituted.[1]

[1] But see *Wallace* v. *Latham*, 52 Miss. 291; *Sprinkle* v. *Horton*, 146 N. C. 258; *Buffalo Trust Co.* v. *Leonard*, 154 N. Y. 141; *Miller* v. *Stark*, 29 S. C. 325.

But even if, in a case where there was an original deficiency of assets (as in *Gallego's ex'ors* v. *Attorney General*) it should be held that the executor, having through mistake paid one legatee in full, and having afterwards been compelled to pay the proportions of the others out of his own pocket, might compel the legatee overpaid to refund, the case would still fall short of that under consideration. Here the executor has not been called upon by a creditor to make good assets improperly paid away, or by an unpaid legatee to pay him a ratable proportion of his legacy out of his own pocket: he is seeking to recover for his own benefit alone. To sustain his claim to such a recovery would be against the whole series of authorities in England, commencing at an early period, and without the support of a single authority or *dictum* in our own courts.[1]

It is the duty of the executor to make himself acquainted with the condition of the estate. The means are in his own hands, and if he neglects to avail himself of them it is his own fault. He is not compelled to pay the legatees until the debts are discharged, and until he has ascertained the precise extent of the assets. He can decline paying except under the decree of a court, and then he is entitled to call upon the legatee to refund if the estate was originally deficient; and he may with us always require a refunding bond. If, without using any of these precautions, he voluntarily pays the legatee, the latter has a right to consider the money as his own; subject, it is true, to be called upon to refund at the suit of creditors, or of an unpaid legatee if the assets were originally deficient. But these are contingencies too remote in his apprehension, when a payment has been made to him under such circumstances, to have any influence on his conduct. The hardship of the case is greater upon the legatee than the executor. He has been in no default. No duty was imposed upon him to examine into the state and condition of the assets. He receives what a payment under such circumstances has impressed him with a conviction he will never be called upon to refund. Such unexpected additions to men's fortunes are frequently spent without much consideration; wasted in the gratification of some want to which the legacy has given birth, or released to some more needy relative. It would be the grossest injustice, under such circumstances, to permit the executor, who had thus misled him by his negligence or inattention to his duties, to compel him at some distant day to refund the money. The case of a legatee, and as between him and the executor, seems to me much stronger than the cases of *Brisbane* v. *Dacres*, 5 Taunt. 144, 1 Eng. C. L. Rep. 43, and *Skyring* v. *Greenwood*, 4 Barn. & Cress. 281, 10 Eng. C. L. Rep. 335, in the first of which cases Gibbs, J., remarked, that he who receives money so paid "has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced

[1] See *In re Horne*, [1905] 1 Ch. 76.

in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money." . . .[1]

McCLUNG *v.* SIEG.

54 W. Va. 467. 1903.

POFFENBARGER, JUDGE:[2]

This is a suit in equity brought in the circuit court of Pendleton county by D. G. McClung, administrator of James M. Sieg, deceased, whose domicile was in Virginia at the time of his death, against John S. McNulty, the Virginia administrator of said Sieg, as such administrator and in his own right, the widow and heirs at law of said Sieg and S. B. McClung, for the purpose of compelling Frances V. Sieg to refund to the West Virginia administrator out of her distributive share the sum of $1,028.62, the amount of a judgment and cost of defending the suit, for a debt of which the administrator had no notice at the time he made distribution, or, to be more accurate, permitted the Virginia administrator to collect the assets in West Virginia and make the distribution, if, legally speaking, distribution has been made. It is claimed by McClung that the fund which he has attached in the hands of S. B. McClung is a part of the uncollected assets of the estate of intestate, although the Virginia administrator had, long before the bringing of this suit, turned that fund over to Frances V. Sieg, the widow, as part of her distributive share, and released S. B. McClung, the debtor, and McClung had executed a new note for the amount payable to Frances V. Sieg. So the debt which S. B. McClung owed to James M. Sieg, plaintiff's intestate, remained in the hands of McClung at the time this suit was brought, but was claimed by Frances V. Sieg. Mrs. Sieg had received from the domiciliary administrator in all, $2,551.00 up to February 1, 1895, and there yet remained due her, on account of her distributive share as shown by the record, $873.88 at that time; but, of the amount, so received by her, $1,101.00 was the amount in the hands of S. B. McClung, which he did not collect but for which she took his note. McClung owed her, on account of some transaction between them, $100.00 with interest from June 8, 1896. This last sum seems

[1] Where overpayment has been made to a legatee or distributee under a mistake of law the personal representative cannot compel a refund. *Phillips* v. *McConica*, 59 Ohio St. 1; *Scott* v. *Ford*, 52 Oreg. 288; *Shriver* v. *Garrison*, 30 W. Va. 456; *Rogers* v. *Ingham*, 3 Ch. D. 351. *Culbreath* v. *Culbreath*, 7 Ga. 64, *contra*. Compare *Northrup* v. *Graves*, 19 Conn. 548; *Prince de Bearn* v. *Winans*, 111 Md. 434; *Livesey* v. *Livesey*, 3 Russ. 287; *Dibbs* v. *Goren*, 11 Beav. 483.

As to whether a legatee or distributee who is compelled to refund must pay interest, see *Gittins* v. *Steele*, 1 Swanst. 199; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Uffner* v. *Lewis*, 5 Ont. L. R. 684.

[2] Part of this opinion, on a question of procedure, is omitted.

not to have been any part of the estate of James M. Sieg. Mrs. Sieg, McNulty and the heirs of James M. Sieg, being non-residents, an order of publication was taken against them, and Mrs. Sieg appeared and filed her separate demurrer and answer to the bill, but there was no appearance for any of the other parties except S. B. McClung, who filed his answer as garnishee in the attachment proceeding. From his answer and the pleadings and evidence in the case the court found that there was due from him to Frances V. Sieg, the sum of $1,013.17 with interest from the —— day of ——, 1891, subject to a credit of $300.00 as of February 9, 1894; $100.00, December 18, 1894; $300.00, February 2, 1896; $100.00, January 5, 1895; $300.00, February 10, 1896; and that he was also indebted to her in the further sum of $100.00 with interest thereon from June 8, 1896, and, on the 10th day of November, 1899, made a decree requiring S. B. McClung to pay over to D. G. McClung, the plaintiff, the amount due from him to Frances V. Sieg as assets of the estate of James M. Sieg, deceased, subject to the payment of any debts against said estate. It is from said decree that this appeal was taken.

It seems that the facts in reference to the debt paid by D. G. McClung, administrator, after the funds belonging to the estate of his intestate, except those in the hands of S. B. McClung, had, by his consent, been collected and taken out of the state by the Virginia administrator, and the money in S. B. McClung's hands had been turned over to Mrs. Sieg, as part of her distributive share, are such as would entitle the plaintiff, upon proper proceedings in a court of equity with the necessary parties in court, to compel reimbursement by the distributees and heirs, although no refunding bond was taken from them. McClung was appointed as administrator in 1876 and there was a large amount of money in the state of West Virginia due to his intestate which he might have collected, but as it appeared that there were no debts of any consequence due from him, to persons residing in this state, McClung permitted C. P. Jones, who had been the law partner of Mr. Sieg in his life time and who was familiar with his business, to collect, as attorney for plaintiff, nearly $6,000.00 and pay it to McNulty. After this had been done and the McClung debt had been turned over to Mrs. Sieg, a judgment was rendered against D. G. McClung, administrator, in the circuit court of Pocahontas county in June, 1893, for the sum of $712.15 with interest from the 20th day of October, 1892, for a debt due from the estate of his intestate. In April, 1897, a decree was entered in a chancery suit in Pendleton county, requiring said McClung to pay the said judgment, then amounting to $904.07, out of his own funds. This was satisfied by him on the 5th day of May, 1897, and, with the interest and costs, then amounted to $945.17. In addition to that, he had been compelled to pay out $83.45 in defending these suits, making his total outlay $1,028.62.

The debt which McClung was compelled to pay seems to have been stubbornly contested on his part and there is no evidence of any fraud or improper conduct imputable to him in that connection and the debt did not appear until after the assets had passed out of his hands. Under such circumstances, legatees may be compelled to refund and the same rule is, of course, applicable to distributees of an intestate's estate. *Jones's Exrs.* v. *Williams*, 2 Call. 103; *Burnley* v. *Lambert*, 1 Wash. 312; *Gallegoe* v. *Lambert*, 3 Leigh 465; 1 Tuck. Com. 425; *Robertson* v. *Archer*, 5 Rand. 319, where, although the court refused a decree for refunding because the claim was too old, the principle is admitted and the legatees were compelled to give refunding bonds for the benefit of the executors as to claims of any other creditors that might exist; *Bower* v. *Glendening*, 4 Munf. 219. Here, the court holds that "If without fraud or collusion, a decree be rendered, by a court of competent jurisdiction, against an executor, he may bring his suit in equity against the legatees, for contribution to satisfy such decree." This Court announces the same doctrine in *McEndree's Am'r* v. *Morgan*, 31 W. Va. 521.

But it is seriously contended that, in order to compel reimbursement, the executor or administrator must sue all the distributees or legatees, so that the burden of refunding will fall upon them in proportion to what they have received from the estate; and that the suit cannot be maintained against Mrs. Sieg alone, she being the only one of the distributees who has appeared. The others are all non-residents and if Mrs. Sieg cannot be held in this suit, the administrator will be compelled to go to a foreign jurisdiction to enforce his claim. In Virginia he might be able to make them all defendants in one suit, but he insists that this Court will not compel him to go out of the state for that purpose. It is undoubtedly true that, ordinarily, all the legatees or distributees should be parties. "The creditors have a double remedy; first, against the executors at law, in which case the executors have their remedy in equity, against the legatees, to compel them to refund; or secondly, the creditors may, in equity, pursue the estate in the hands of the legatees; and in either case, all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole. But if this direct mode against a particular legatee was permitted, it would put it in the power of the creditor, to mark out the person, in the first instance, to sustain the whole weight." *Burnly* v. *Lambert*, 1 Wash. 313; *Scott* v. *Halliday*, 5 Munf. 103; *Sampson* v. *Bryce*, 5 Munf. 175; *Lewis* v. *Overby's Adm'r*, 31 Grat. 601. But the circumstances of this case are unusual and extraordinary in this, that Mrs. Sieg is the only distributee (assuming that the legal title to the fund in McClung's hands was held by her when it was attached) who had any property in this state that could be subjected to the claims of the administrator. But for that circumstance, he would have had no remedy against her here. Had they all been

residents of the state of West Virginia, or all had property within the jurisdiction of the court, it would have been the duty of McClung to sue them all and make them contribute ratably to his reimbursement. As it is clear that for want of means to bring any of them except Mrs. Sieg within the jurisdiction of the court, plaintiff can proceed against her only, shall it be said that he is deprived of his remedy against her because jurisdiction of the balance of the distributees cannot be obtained? If that be true and the distributees were domiciled in different states, he could not obtain relief against any of them. Such is not the tendency of the decisions nor the spirit of the law. In *Ryan's Adm'r.* v. *McLeod*, 32 Grat. 367, where it was sought to subject real estate in the hands of heirs to the payment of their ancestor's debts, one of them had sold his portion to a *bona fide* purchaser and had become insolvent, and the portions of the other heirs were subjected to the payment of the whole of the debts. The same principle is applied in *Lewis* v. *Overby*, 31 Grat. 601. Although these cases are not exactly in point, they show that where it is impossible to make the heirs contribute ratably, the portion which cannot be collected from one of them because of his insolvency may be charged against the others. The case is analogous to that of a joint demand as to which it is necessary that all the obligors be made parties. In those cases the non-residence of part of them does not preclude judgment as to such of them as can be legally served with process. Nor is it any objection to proceeding by attachment as to any of them who may happen to have property within the jurisdiction of the court. "Where, in an action or suit against two or more defendants, the process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all." Code, c. 125, Sec. 52. If Mrs. Sieg is compelled to pay the whole of this judgment, she will be entitled to contribution from the other distributees of the estate. "Legatees are liable to refund even at the suit of other legatees in some cases. As where the assets were originally deficient, and all are bound to abate in proportion; there if the executor pays one in preference to the rest, they may exhibit their bill and compel him to refund." Tuck. Com. 425; Toll. 341. "In all cases legatees are liable to refund at the suit of creditors, if there is a deficiency of assets." Tuck. Com. 425. The same principle that makes it necessary to make all the distributees parties, where the administrator is entitled to be reimbursed, and all can be made parties, entitles one legatee, who is compelled to refund the whole amount to the personal representative, to have contribution from all the others. Manifestly, it is a hardship upon Mrs. Sieg to compel her to refund the whole of this debt to the administrator. But as she may compel the other distributees to contribute and

relieve her of all of it except what she is equitably bound to pay, it would be a much greater hardship upon the administrator to deny him relief, for, in that event, he has no remedy. Although it is claimed that he should have gone to the State of Virginia to have instituted this suit where he could have brought all the distributees in to answer his bill, that contention is not in conformity with the principles of law. Where a plaintiff may resort to either of two different forums in the same jurisdiction, the one to which he does go will not turn him away simply because he may obtain relief elsewhere. This being true, it will be difficult to find a satisfactory reason for the refusal of a court, having power and authority to give relief, to entertain the plaintiff's bill on the ground that he may obtain relief in a foreign jurisdiction. No precedent for such action has been cited or found.

These views are strengthened by the following legal propositions: "Each independent sovereignty considers itself competent to confer, whenever there is occasion, a probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person, or lawful debts owing, within reach of its own mandate and judicial process." Schouler's Ex. & Adm'r, Sec. 165. One of the main purposes of the appointment of an ancillary administrator is the subjection of the assets of the decedent to the payment of his debts due the citizens of the local sovereignty. "In practice, the local sovereignty, state or national, permits letters to issue upon the estates of deceased non-residents, mainly for the purpose of conveniently subjecting such assets to the claims of creditors entitled to sue in the local courts, and for appropriating whatever balance may remain to the state or sovereign, by way of distribution, in default of known legatees or kindred." *Id.* Sec. 166. While, by comity, the courts of the jurisdiction in which the property is found will recognize the rights of non-resident legatees and heirs, and will permit any surplus, after paying the local indebtedness, to be paid over to the domiciliary administrator or executor, it is only done in a spirit of comity and as a matter of judicial discretion. The local sovereignty may compel them to come into its own jurisdiction to receive what belongs to them. "The rule to thus pay over is not, however, absolute; on the contrary, the transfer will not be made if deemed, under the circumstances, improper; and legislative policy is to secure the rights of its creditors and citizens at all hazards. * * * For the spirit of comity does not require that citizens shall be put to the inconvenience and expense of proving and collecting their claims abroad when there are assets at hand." *Id.* Sec. 174. Another matter worthy of consideration in this connection is, that the West Virginia administrator could not, as such, sue in the courts of Virginia, if at all, without making settlement

there of his administration accounts, and it may be doubted whether he could sue at all in Virginia, where there is another administrator of the same intestate, except as a creditor. If not actual obstacles, there are inconveniences, standing in the way of this plaintiff, if he should be turned out of the courts of this state and compelled to go to Virginia to enforce reimbursement.

Another contention is that the fund in the hands of S. B. McClung cannot be treated as assets of the estate of plaintiff's intestate because it has been turned over to Mrs. Sieg. If it were uncollected and unadministered assets, there is no ground upon which this suit could be resisted. But it is claimed that it has been collected with the consent of the plaintiff by the Virginia administrator and distributed by him, and that, in consequence thereof, the West Virginia administrator, not having paid it to Mrs. Sieg, cannot be reimbursed out of that fund. Under the principles of law governing the relations of ancillary and domiciliary administrators, the collection and distribution of the West Virginia assets by the Virginia administrator, with the consent of the West Virginia administrator, is equivalent to such collection and distribution by the West Virginia administrator. The Virginia administrator could make no collections here except with the consent of McClung. Schouler's Ex. & Adm'r. Sec. 173.

But it is contended further that the greater part of the money in the hands of S. B. McClung and claimed by Mrs. Sieg never was the property of plaintiff's intestate but that it belonged to Mrs. Sieg herself. She is the sister of S. B. McClung, and, on the partition of the real estate of their father in 1867, there became due to her from her brother, $250.00 as owelty of partition. Her husband loaned McClung some additional money and took his note payable to himself for his own money and the money due his wife. The $100.00 hereinbefore mentioned is money that Mrs. Sieg loaned her brother, S. B. McClung. Granting, for the purpose of discussion, that all this money belonged to Mrs. Sieg and never was a part of the assets of James M. Sieg, it is liable to be subjected to the payment of plaintiff's claim. Her liability to refund is contractual in its nature and not only the specific fund or property which she received for her distributive share, but any other property belonging to her and found in the state of West Virginia, which, by its nature, may be subjected to the payment of her debts generally, is liable. The only limitation is, that she shall not be compelled to pay back more than she has received from the estate. There is no possibility of her being compelled to do that in this case for the reason that she does not deny having received from the estate $2,551.00, while the plaintiff here only claims $1,028.62. There is certainly no rule which limits the recovery so as to make it payable only out of these specific funds or property received by the distributee. No authority for any such limitation is offered. . . .

The decree of the 10th day of November, 1899, requiring S. B. McClung to pay over the money to D. G. McClung, administrator, was erroneous, for the reason that at that time the court had not judicially determined how much the plaintiff was entitled to require Mrs. Sieg to refund. It was not a suit to recover unadministered assets, but one to compel reimbursement, and she could not be required to pay over to him more than was necessary to reimburse him. By that decree, the report of the commissioner, formerly made in the cause, was recommitted without confirmation. However, on the 9th day of April, 1900, after the commissioner had again reported, the court confirmed his report and found that after applying, on the claim of the plaintiff, all of the money which had been paid to him by S. B. McClung under the former decree, there yet remained due him and unpaid $421.98. The appeal and *supersedeas* were not obtained until the 9th day of April, 1900. Thus, before the erroneous decree was appealed from, the court had determined the amount to which the plaintiff was entitled and applied the fund in controversy to its satisfaction. Hence, the error in the decree of November 10, 1899, was substantially corrected by another decree before the appeal was taken. At any rate, it is made certain by said subsequent decree that the error in the former one was not prejudicial. To warrant a reversal, the error complained of must be prejudicial. *Clark* v. *Johnson*, 15 W. Va. 804.

There being no error in the decree, it is to be affirmed.[1]

[1] The opinion on rehearing, which affirmed this decree, is omitted.

Compare *Cutright* v. *Stanford*, 81 Ill. 240; *Calhoun* v. *Tangany*, 105 Ill. App. 23; *Rohrbaugh* v. *Hamblin*, 57 Kan. 393; *Rubell* v. *Bushnell*, 91 Ky. 251; *Caire* v. *Judge*, 34 La. Ann. 1133; Massachusetts Rev. Laws (1902), c. 141, §§ 29–32; *Walker* v. *Deaver*, 79 Mo. 664, 679; *Butts* v. *Genung*, 5 Paige 254, 259; *Badger* v. *Daniel*, 79 N. C. 372; *Miller* v. *Schoaf*, 110 N. C. 319; *Lewis* v. *Overby*, 31 Gratt. 601, 618; *Ryan* v. *McLeod*, 32 Gratt. 367, 374; *Gillespie* v. *Alexander*, 3 Russ. 130; *Davies* v. *Nicolson*, 2 De G. & J. 693.

CHAPTER XI.

GIFTS MORTIS CAUSA.[1]

JOHNSON *v.* COLLEY AND OTHERS.

101 Va. 414. 1903.

HARRISON, J., delivered the opinion of the court.

The question presented by this record is the validity of an alleged gift *causa mortis*. The facts are few, simple, and uncontradicted.

It appears that Joseph Newton Johnson, a bachelor advanced in life, lived in the county of Goochland in comfortable circumstances, being the owner of valuable real and personal property. The only person living with him at the time of his death and for some time prior thereto were Lizzie Johnson, a negro woman, and her two illegitimate children, one of whom was Libby Carter Johnson, a little girl about 11 years of age, who, by her next friend and guardian *ad litem*, is the appellant here. These persons, Lizzie Johnson and her two children, attended to the domestic affairs of Joseph Newton Johnson, doing his cooking and washing, and waiting on him generally. It appears that the deceased was warmly attached to the appellant, saying that "he thought as much of her as if she were his own dear child, and that he would provide for her well at his death." The evidence is abundant that the deceased attempted to accomplish this cherished purpose. In August, 1901, he had prepared by his friend and neighbor, George P. Cowherd, the treasurer of the county, a will by which he made this child his sole legatee and devisee except to the extent of providing a home for her mother with her. On the day before his death he sent for his friend, Mr. Cowherd, and had him read over the will prepared in August, 1901, which had not been executed. After reading the paper, Cowherd asked him if he wished any changes made. He replied that he did not, that the will was as he wanted it. He then asked that Marcus Smith be called in, and that he and Cowherd would witness the will. Cowherd suggested that, as he had been named as executor, some one else had better act as witness. Thus the execution of the will was temporarily postponed. As Cowherd was leaving the room, the deceased handed him a bundle of money, with the injunction, that, if he died, or anything happened to him, Cowherd must give it to the little colored girl, Libby Carter Johnson, and see that she got it. Mr. Cowherd

[1] See in general 99 Am. St. Rep. 890 note; 3 L. R. A. 230 note; 6 L. R. A. 366 note; 7 L. R. A. 439 note; 11 L. R. A. 684 note.

then left the room with the money in his possession, and did not again see the deceased, who died the next day, without having perfected the execution of the will which had been prepared in accordance with his wishes.

After the death of Johnson, the money placed in the hands of Cowherd for the appellant was counted in the presence of witnesses, and found to amount to the sum of $1,758.43, and then deposited in bank by Cowherd for safekeeping, until he should be advised as to its proper disposition.

Briefly stated, the essential attributes of a gift *causa mortis* are: (1) It must be of personal property; (2) the gift must be made in the last illness of the donor, while under the apprehension of death as imminent, and subject to the implied condition that if the donor recover of the illness, or if the donee die first, the gift shall be void; and (3) possession of the property given must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee.

These propositions are so well established that citation of authority is not necessary in support of them.

In the case at bar the *factum* of the gift is clearly established. It is also indisputably shown that the gift was of personal property, and that it was made during the last illness of the donor, and under the apprehension of death as imminent, the donor having died of his then existing disorder the following day.

It is contended that the delivery of the package of money to Cowherd was not an absolute surrender of dominion and control over the property; that it was not a complete transfer of present title and possession to the donee; that the gift was testamentary in character, and therefore void.

By "testamentary" is meant that no title whatever was to vest in the donee until the donor's death; that thus the gift was in the nature of a testament, and, not being executed in the mode prescribed by the statute of wills, it was inoperative.

The title to every gift *causa mortis* must vest in the donee at the time of the gift. It vests, however, subject to certain conditions subsequent.[1] The donor may revoke the gift during his life, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee. If it is not revoked or defeated by operation of law, it becomes absolute at the donor's death, but not until then. 3 Minor's Inst., p. 606; 2 Kent, 444; 3 Redfield on Wills (2d Ed.), p. 322, etc.; 1 Story's Eq., Sec. 606; 3 Pom. Eq., Sec. 1146.

Subject to these conditions, which are incident to every gift *causa mortis*, and may arise to defeat the title vested in the donee, there was certainly a delivery of the package of money to George

[1] *Basket* v. *Hassell*, 107 U. S. 602, *post*, p. 839, *accord*. But see *Hatcher* v. *Buford*, 60 Ark. 169, 175–178; 3 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1146, 1147.

P. Cowherd, who took complete physical possession of it, and at once removed it from the house of the donor to his own home for safekeeping. As already seen, the donor had the right to revoke the gift, or it may have been defeated, in the manner indicated, by operation of law, but apart from these conditions, to which the gift was subject, it is difficult to perceive what control the donor could have exercised over current money in the hands of another at some distance from his dying bed. From the time of the delivery until the death of the donor the money was in the exclusive possession and control of Cowherd, the donor having transferred to the donee a present title to the inchoate, imperfect, and defeasible interest contemplated by every gift *causa mortis*.

It is insisted that the language of the donor, "if I die, or anything happen to me," which accompanied the delivery of the money, was a condition attached to the gift that it was not to take effect until the donor's death, and shows that a testamentary disposition was intended, and not a gift *causa mortis*. The language used by the donor is but the expression of the condition attached by implication of law to every gift *causa mortis* — that it does not take effect absolutely and irrevocably except in case of the death of the donor. It is not necessary that the donor should express the condition, but, if he does so, it tends to make plain the character of the gift, rather than to cast doubt upon it. So far as we have had access to the authorities, they are practically unanimous in holding that the language "if I die," when used by the donor in making the gift, is but an inference of law from the circumstances, and does not impair the gift. *Wells* v. *Tucker*, 3 Bin. 370; *Snellgrove* v. *Bailey*, 3 Atk. 214; notes to *Ward* v. *Turner*, 1 Lead. Cas. in Eq., p. 1222; *Thomas* v. *Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

The language "if anything happen to me" was but another mode of expressing the donor's apprehension of death, and was not intended to annex some condition other than death to the gift. Under the circumstances in which the words were employed, they commonly mean "if I die," their use being repetition, adding nothing to the last-mentioned expression. *Thomas* v. *Lewis*, *supra*; *Shackleford* v. *Brown*, 89 Mo. 546, 1 S. W. 390; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313. In the last-named case Judge Peckham, in delivering the opinion of the court, referring to the words of the gift, said: "The declaration of the donor that his wife should keep the assignment, and not hand it over to the donee till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law as to the gift, whether the declaration was or was not made. Clearly, he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void."

[The learned judge then distinguished the case of *Basket* v. *Hassell*, 107 U. S. 602, *post*, p. 839 and continued as follows: — ED.]

We will not prolong this opinion to review in detail several other cases relied on by the appellees. They have been fully considered, and are not regarded as at all affecting the soundness of the conclusion reached in the case at bar.

Judge Lewis spoke for this court in *Yancey* v. *Field*, 85 Va. 756, 8 S. E. 721, and he has demonstrated the inaptness of that case as authority for this in an opinion filed by him in the case of *Thomas* v. *Lewis*, *supra*.

It is further contended that George P. Cowherd was merely the agent of the donor to deliver the package of money to the appellants after the donor's death; that the agency ceased with the death of the donor; and that Cowherd was left without authority to act or carry out the instructions of his principal with respect to the money placed in his hands. Delivery may be made to a third person under such circumstances as to create an agency merely; as where the donor retains dominion or control over the thing given. If, however, the delivery is made to a third person for the use of the donee, or under such circumstances as indicate that the donor relinquishes all right to or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained.

Where one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such a delivery to a third person for the use of the intended donee as he is then capable of making considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as the agent of the donor. *Wells* v. *Tucker*, 3 Bin. 370; *Deval* v. *Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; *Shackleford* v. *Brown*, 89 Mo. 546, 1 S. W. 390; *Sessions* v. *Moseley*, 4 Cush. 87; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313; 3 Minor's Insts., p. 603; Roper on Legacies, Vol. 1, p. 5; Schouler, Pers. Prop. 1645.

In the case at bar the object of the donor's bounty was a child of tender years. He was a man of intelligence and business experience, and doubtless knew that this child was too young to be intrusted with the large sum of money he desired to give her, and for this reason he turned to his friend and adviser, in whom he appears to have had great confidence, and placed the money in his hands as the surest means of securing the same for the use and benefit of this little child upon whom his last earthly solicitude was lavished. There being no countervailing circumstances, one who thus receives property for another must be held to be the trustee of the intended donee, and not the agent, merely, of the donor.

We are not unmindful of the great danger of fraud in this sort of gift, and that courts cannot be too cautious in requiring clear proof of the transaction. Nor are we prepared to dispute the wisdom

of Lord Eldon's observation that "it would be quite as well if this donation *causa mortis* were struck out of our law altogether." [1] So long, however, as the law remains unchanged by competent authority, imbedded as it is in our jurisprudence, and sanctioned by the experience of centuries, the courts must give it effect in cases like this, where the evidence is clear and convincing.

For these reasons the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

TATE *v.* HILBERT.

2 Ves. Jr. 111. 1793.

THE plaintiffs in these causes were relations of Mark Bell: Jane his niece; and Mary his great niece. The object of the first bill was to have a banker's cheque for £200 paid, either out of £800 cash belonging to Mark Bell in his banker's hands at the time of his decease, and admitted by the defendant, the executor, to have been possessed by him, or out of his general assets. The cheque was in this form: — "Pay to self or bearer £200. Mark Bell."

The other bill was to have payment of a promissory note, for £1000 to the plaintiff Jane, signed by Mark Bell. These claims were made upon the footing of *donatio mortis causa*, or as appointments in nature of it. Mark Bell by his will, made in November, 1789, gave to the plaintiff Mary a legacy of £500, and to the plaintiff Jane a legacy of £100 and an annuity jointly with his sister for the lives of them and the survivor. He made several other bequests to a great amount; but gave the bulk of his fortune to his son; who afterwards became a lunatic. The transaction of the gifts to the plaintiff, who were mutually evidence for each other, rested solely on their testimony; as no other person was present at the time. On their testimony it stood thus: "The testator sent for Mary Tate from London to his house at Battersea. On 25th January, 1790, he observed, that he was worth more than he thought; that his fortune was too much for one person; and therefore he would give away more than he had given by his will. He then desired Jane to give him out of his desk several bonds and securities to the amount of upwards of £3000 which he cancelled by tearing off the seals. He then told Mary, he would give her £200; and desired Jane to give him a cheque out of the drawer of his desk; which she did; and he immediately filled it up, signed it, and gave it to the plaintiff Mary. This was the cheque, upon which the first bill was founded. At the same time he gave the plaintiff Jane the promissory note for £1000 which was the subject of the other. The

[1] *Duffield* v. *Elwes*, 1 Bligh N. S. 497, 533.

testator was infirm, but of sound mind at the time; and was not pressed or asked by either of the plaintiffs to do anything for them."

On January 26th the testator made two codicils; by one of which he revoked a devise to a nephew; and gave a legacy in lieu of it; and gave some diamonds, furniture, plate, &c. In the other he mentioned, that he had cancelled debts due to him from his two nephews; which were the securities he had according to the evidence of the plaintiffs cancelled the preceding day. The codicil expressed his intention by that cancellation to release those debts; and it also discharged other debts from other relations. Neither codicil took notice of the transaction of the preceding day, on which these bills were founded. The testator died four days after the codicils were made. He was eighty three years old and very infirm: but there was no evidence of any particular illness.

Lord Loughborough, C. By the first of these bills it is supposed, that this cheque is totally ineffectual without the aid of this court. I have given the case much attention from a settled persuasion, that upon the part of the plaintiffs it is a proceeding perfectly fair and honest: but, though that is the color of the facts in the present instance, yet these cases are liable to the observations, which have been made, that to make a stretch to effect gifts, made to persons surrounded by relations who give evidence for each other, would be attended with great inconvenience. There is no doubt, that in this case the transaction is fair. If it fails, it is a case of mistake upon the part of the person, meaning to give, and also of mistake, or delicacy, upon the part of the person, to whom the gift was made; as if she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think, no court would have taken it from her. But with all the disposition I feel to make it effectual, I must resist that impulse; as nothing is so dangerous as to decide upon circumstances of favor to particular parties; and, unless I can find some solid ground to support it, so that there will be no danger from the precedent, I cannot decree for the plaintiff. The claim of the plaintiff Mary is supported upon the ground, that the delivery must be *donatio mortis causa;* and is within the description given by Swinburne; and operated as an appointment of so much money in the banker's hands in favor of the person put in possession of the note, payable to bearer; and in support of this *Lawson* v. *Lawson*, 1 P. Will. 441, was cited and commented on. Upon the other hand it was contended, that this was a banker's cheque, a common cash note; and that it would be a strain and confusion of terms to constitute it an appointment; that it is simply a gift: that they cannot claim as a legacy, nor as a debt; and therefore that this court will not give it more effect than

it would have at law. I have looked into the cases; of which there have been several upon this question. The reasoning is generally taken from the civil law, and with great propriety; as the jurisdiction, in which these cases may as well occur as here, is the Ecclesiastical Court, which has properly followed the reasoning of the Roman law. All the passages in Swinburne are only references to different texts of the civil law; and where he defines *donatio mortis causa*, he is coupling the description of a legacy with a very short text of the civil law; and there is a perplexity in it. He takes it from a part of the civil law complied at a time, when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy.

There are three species, of which he takes notice; first where a person, not terrified by fear of any present peril, but moved by the general consideration of man's mortality, makes a gift: the second is, where a person, being moved by imminent danger, gives so that the subject is immediately made his, to whom it is given: the third is where a person being in peril of death, gives something, but not so, that it shall presently be his, that received it, but in case the giver dies. The two first are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations; and rates them all under the general title *Donatio mortis causa*. That is the time, when it was in dispute. "*Julianus* libro 17 Digestorum tres esse species mortis causa donationum ait; una cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis, donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta." If he had looked a little farther under the same title, he would have found there an opposite, but a much more correct, opinion; which finally prevailed, and was established as legal. It is the 27th law. "Ubi ita donatur mortis causa, ut nullo casu revocetur, *mors*" (that must be supplied) "causa donandi magis est, quam mortis causa donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio: ideoque inter viros et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causa donatione." In the institutions in the time of Justinian, Tit. 7, *De Donationibus*, there is a history given of these contests that had prevailed: and a definition is strictly given of what shall be *Donatio mortis causa*. "Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit reciperet: vel si eum donationis pœnituisset: aut prior decesserit is, cui donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia;

nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur; et sic procedat quemadmodum nostra constitutio eam formavit: et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum."

There it is clearly and correctly defined, that it had in effect the nature of a legacy; was liable to debts; and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned at the same time with the passage, I have read, an ordinance by the Emperor, that it should be in writing with five witnesses. In the case before Lord Hardwicke, in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that by the law of England it cannot be a present, absolute, gift, but to take effect on the death of the party; and, following the line there, and supporting his own authority, he considers delivery essential. It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps it might not be difficult to conceive, that it might be by deed or by writing. It is clear, it could not be by mere parol; as saying, "*I give*," without an act, does not transfer the property. So far I concur with the reasoning in that case. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the Ecclesiastical Court: and that the property so given is not to be possessed by the executor. It is bad against creditors; and therefore within the reach of creditors; but does not regularly fall within an administration; or require any act by the executor to constitute a title in the donee.

It was observed for the defendant, that the case of *Lawson* v. *Lawson* was overturned by Lord Hardwicke. I have caused the Register's book to be searched; and the report in P. Williams is certainly inaccurate: but the decision is perfectly right. The only doubt remaining with regard to the case was, whether it was not necessary in point of form to have authority from the Ecclesiastical Court: but I think the Master of the Rolls was right in not requiring probate. As it stands in the book, you take it only as matter of fact and evidence, that the money, for which the bill was given, was to be applied in mourning: but by the Register's book that was actually indorsed upon the bill. According to that in fear of a sudden change he did give to the defendant £100. That was an immediate gift. It proceeds to say that he drew a bill upon the defendant Middleton payable ten days after sight; and by a note in the bill of his own handwriting declared it to be for this defendant for mourning; and refers to the said note in writing in her custody.

There were also contained in it directions concerning the children's mourning. The only question that could arise there, had the argument taken a larger scope, than it did, was, whether this note should be proved. In the report you do not see the *ratio decidendi*. In one part the Master of the Rolls states it as an appointment; in another he lays stress on its being for mourning: but it was not necessary to prove it; as, taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of £100 for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose, I was to apply that idea of an appointment, this is to take effect presently; and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death: but it is stronger in this particular case; as by the evidence it was given, and fairly given. At the time he made this gift the act he was about to do was not legatory, to bequeath; on the contrary from the conversation, that took place, and the act, he was about to do, having considered what he had done by his will he meant to give more; and in doing so to make effectual gifts. Under that idea he cancelled those securities; not meaning them to be unavailable only in case of his death. In the same way he meant what he did for these plaintiffs as immediate gifts. Therefore I can make no more of this. I do not like to take it up upon favor to the parties, or to speculate upon it as an appointment. Being a gift it cannot be sued for as a legacy. I cannot make it better. If the law will not allow her to recover against the executor any more than against the banker, I lament it: but I cannot give it more effect than it can have at law. I do not know, whether it has been considered as to the possibility of bringing an action against the executor. If the promissory note can be made good at law, one should feel no reluctance to make it good; but they must stand, as they are at law; and this court cannot give the parties any relief. If there is anything intended to be done at law, I should have no difficulty to retain the bill; as if any accounts were to be had as to assets.

It was admitted, that the assets were abundant.

The Attorney-General [*Sir John Scott*] for the plaintiffs, said, that as to the promissory note they had opinions of common lawyers in favor of an action. He therefore desired time to consider upon it.

THE LORD CHANCELLOR asked, whether any hope was entertained that they could recover at law upon the draft on the banker? The Attorney-General said, he did not know of any.

The first bill was then dismissed: but upon the application of the Attorney-General, without prejudice to any action at law; in order that it might not be considered as an authority against such action.[1]

VEAL *v.* VEAL.

27 Beav. 303. 1859.

The testatrix, Frances Veal, died on the 29th of March, 1858. She possessed two promissory notes for £60 and £120, both of which were in the following form: —

Box, March 17th, 1852.

On demand, I promise to pay to Miss Frances Veal *or order* the sum of £60, with lawful interest for the same. For value received.

Catherine Rowe.
Elizabeth Noble.
£60. Thomas Noble.

Shortly previous to her death, being told by her medical attendant that her complaint would terminate fatally, she delivered over the two promissory notes, unindorsed, to her niece, Mary Maslen, by way, as was alleged, of a *donatio mortis causa*. Mary Maslen retained them down to the death of the testatrix, and now claimed the amount.

The validity of this gift was contested, on the ground that a promissory note payable to order, and not indorsed, could not be made the subject of a *donatio mortis causa*.

The Master of the Rolls. [Sir John Romilly.] The question in this case is, whether a testatrix has made a good *donatio mortis causa* of two promissory notes payable to the testatrix "*or order*," she not having indorsed them. It is solely a question whether such a donation is really good, and if anything more remains to be done by the donor; the state of the authorities is by no means satisfactory. The earlier authorities point very distinctly in one direction, as *Miller* v. *Miller*, 3 Peere Williams, 356; *Ward* v. *Turner*, 2 Ves. Sen. 431. Lord Hardwicke extended the doctrine to a bond, but he said he would go no further. Then comes the case of *Duffield* v. *Elwes*, 1 Sim. & St. 239; 1 Bligh, N. S. 497, in which Sir John Leach

[1] And see *Pullen* v. *Placer County Bank*, 138 Cal. 169; *Raymond* v. *Sellick*, 10 Conn. 480; *Mason* v. *Gardner*, 186 Mass. 515; *Detroit Bank* v. *Williams*, 13 Mich. 282; *Harris* v. *Clark*, 3 N. Y. 93; *Holmes* v. *Roper*, 141 N. Y. 64; *Brown* v. *Moore*, 3 Head 671; *Holley* v. *Adams*, 16 Vt. 206; *Smith* v. *Kittredge*, 21 Vt. 238; *Holliday* v. *Atkinson*, 5 B. & C. 501; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Re Leaper*, 114 L. T. N. S. 1157. But it has been held that a check of the donor for the whole of his deposit in a bank may operate as a gift *mortis causa* of the fund. *Bank of Chicago* v. *O'Byrne*, 177 Ill. App. 473; *Aubrey* v. *O'Byrne*, 188 Ill. App. 601; *Weber* v. *Salisbury*, 149 Ky. 327; *Varley* v. *Sims*, 100 Minn. 331. And see *Taylor's Estate*, 154 Pa. 183. The authorities are collected in 10 Am. & Eng. Ann. Cas. 475 note.

laid it down, that the same principle which applied to voluntary gifts *inter vivos* was applicable to donations *mortis causa*, and that if, in the case of a *donatio mortis causa*, something more remained to be done by the deceased person, which this court would not have compelled him to do in his lifetime, it could not be a good *donatio mortis causa* after his death. Lord Eldon came to an opposite conclusion, but he does not appear to have overruled the former decisions; and in that state of the authorities, it becomes very embarrassing to ascertain what the state of the law now is.

I have gone through the cases and some notes of a case not reported, but which is to be found in Chitty on Bills, namely, *Rankin* v. *Weguelin*.[1] I thought that case extremely important, because it is stated that the bills were payable to order, and I find that the registrar's book fully bears out the conclusion stated in Chitty. It appears from the papers that the bills were drawn on the East India Company in favor of Colonel Weguelin or order, and were accepted; but it does not appear, from the papers, whether they were indorsed by Colonel Weguelin. Shortly before Colonel Weguelin's death, he gave them to his wife. The Master, in taking the accounts, included them in the outstanding estate of the testator, and the widow took an exception to his report. It was heard on the 7th of June, 1832, and it appears beyond all doubt, that the case was argued. The registrar's note-book states, that Mr. Bickersteth opened the exception, and that Mr. Pemberton and Mr. Rolfe were heard in favor of the report, and that several affidavits were read. The court took time to consider, and on the 14th of June, judgment was delivered by Sir John Leach, who allowed the exception and made a declaration that there was a good *donatio mortis causa*.[2]

It is, therefore, precisely the point which arises in the present case, and as it is a decision of Sir John Leach, whose decision in *Duffield* v. *Elwes* was overruled by the House of Lords, and who, therefore, must have considered that the decision of the House of Lords had settled the question, I feel bound by it. I also think it a much more healthy state of the law, that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be clear that he intended to give them. I will, therefore, make a declaration, that the two notes passed to Mary Maslen.[3]

[1] 27 Beav. 309.

[2] And see *Turpin* v. *Thompson*, 2 Met. (Ky.) 420; *Caldwell* v. *Renfrew*, 33 Vt. 213.

[3] *Druke* v. *Heiken*, 61 Cal. 346; *Edwards* v. *Wagner*, 121 Cal. 376; *Brown* v. *Brown*, 18 Conn. 410; *Ashbrook* v. *Ryon*, 2 Bush 228; *Borneman* v. *Sidlinger*, 15 Me. 429, 21 Me. 185; *Grover* v. *Grover*, 24 Pick. 261; *Bates* v. *Kempton*, 7 Gray 382; *Pace* v. *Pace*, 107 Miss. 292; *Baker* v. *Moran*, 67 Oreg. 386; *In re Mead*, 15 Ch. D. 651; *Clement* v. *Cheeseman*, 27 Ch. D. 631, *accord*. Compare *Cronin* v. *Chelsea Savings Bank*, 201 Mass. 146. *Bradley* v. *Hunt*, 5 G. & J. 54; *Miller* v. *Miller*, 3 P. Wms. 356, *contra*.

A bond without formal assignment may be the subject of a gift *mortis causa* by

GRYMES, Respondent *v.* HONE, Executor, etc., Appellant.

49 N. Y. 17. 1872.

Peckham, J.[1] On the 19th August, 1867, the alleged donor being the owner of 120 shares of stock, included in one certificate, in the Bank of Commerce of New York city, made an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, under seal and witnessed, of twenty shares thereof to this plaintiff, his favorite granddaughter, for value received, as the assignment purports, and appointed her his attorney irrevocable to sell and transfer the same to her use. After this paper had been signed, "he kept it by him for a while" (how long, nowhere appears), and afterward handed it to his wife to put with the will and other papers in a tin box she had. When he gave to his wife the papers drawn, he said: "I intend this for Nelly. If I die, don't give this to the executors; it isn't for them, but for Nelly; give it to her, herself." She asked, "Why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last or what may happen, or whether we may not need it." This is the statement, as given by the widow of donor. It was admitted that, at the time of executing said instrument, the donor was from seventy-eight to eighty years of age, was in failing health, and so continued till his death, January 23d, 1868. Upon these facts was there a valid gift *mortis causa?*

Upon the question as to what constitutes such a gift, the authorities are infinite, not always consistent. But at this time it is generally agreed that, to constitute such a gift, it must be made with a view to the donor's death from present illness or from external and apprehended peril. It is not necessary that the donor should be *in extremis*, but he should die of that ailment. If he recover from the illness or survive the peril, the gift thereby becomes void; and until death it is subject to his personal revocation. 2 Kent, 444, and cases cited; 2 Redfield on Wills, 299 *et seq.;* 1 Story's Eq., Sec. 606, etc., notes and authorities.

In the next place there must be a delivery of it to the donee or to some person for him, and the gift becomes perfected by the death of the donor.

Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril.

the obligee. *Waring* v. *Edmonds*, 11 Md. 424; *Wells* v. *Tucker*, 3 Bin. 366; *Snellgrove* v. *Baily*, 3 Atk. 214; *Gardner* v. *Parker*, 3 Madd. 184; *Duffield* v. *Elwes*, 1 Bligh N. S. 497.

And so of a policy of insurance. *Hani* v. *Germania Life Ins. Co.*, 197 Pa. 276; *Amis* v. *Witt*, 33 Beav. 619.

On the validity of such a gift of a mortgage securing a note or bond, see *Drake* v. *Heiken*, 61 Cal. 346; *Kill* v. *Weaver*, 94 N. C. 274; *Duffield* v. *Elwes*, 1 Bligh N. S. 497.

[1] The opinion only is given.

3. There must be a delivery. The appellant insists that the gift in this case fulfils neither requisition.

Was this gift made with a view to the donor's death? It is so found by the referee as a question of fact. What the witness intended to convey by the term "failing health" is not clear; but intendments are against the appellant where the fact is left uncertain. There is nothing in the case inconsistent with the idea that the testator, when he signed this assignment, was confined to his bed, and so continued till his death; though I do not wish to be understood as saying that such confinement was necessary to validate the gift. It seems that he died, as the referee finds, from this failing health, in five months thereafter; so that the terms, as used, indicated a very serious ailment.

True, he did not, and of course could not, know when death would occur when he executed this assignment, but he was in apprehension of it. His age and his "failing" told him death was near, but when it might occur he had no clear conviction. An ailment at such an age is extremely admonitory.

From these facts, can this court say, as matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting "in view" of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do, the gift is avoided. The authorities cited by the appellant's counsel, of *Weston* v. *Hight*, 5 Shep. Me. 287, and *Staniland* v. *Willott*, 3 McN. & Gor. Ch. R. 664, are both instances of recovery, and the gifts, on that ground, declared void. In the latter, the donor and his committee recovered back the stocks given, because of his recovery. The first case is improperly quoted in 2 Red.; 300, note 11, as not originally authorizing the gift.

The declaration of the donor, that his wife should keep the assignment and not hand it over till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law, as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void.

The transaction as to such a gift is, the donor says, I am ill, and fear I shall die of this illness; wherefore I wish you to take these things and hand them to my granddaughter after my death; but do not hand them to her now, as I may recover and need them. A good *donatio mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. *Staniland* v. *Willott, supra.*

To make a valid gift *mortis causa*, it is not necessary that there should be any express qualification in the transfer or the delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. See the last case.

I think this donor made this gift "with a view to his death," within the meaning of the rule on that subject.

2d. This also settles the second requisite, as it is admitted that he did not recover, but died of this "failing health," as it is expressed.

3d. Was there a delivery? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned, this is sufficient. See the elementary writers before cited; also *Drury* v. *Smith*, 1 P. W. 404; *Sessions* v. *Moseley*, 4 Cush. 87; *Contant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, 8 Shep. Me. 185; *Wells* v. *Tucker*, 3 Binn. 366; *Hunter* v. *Hunter*, 19 Barb. 631. Such a delivery to be given to the grantee after the grantor's death is good as to a deed of real estate. *Hathaway* v. *Payne*, 34 N. Y. 92.

It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

Within the modern authorities this gift was valid, notwithstanding these objections. The donor, by this assignment and power, parted with all his interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a *bona fide* purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 80, and cases cited, though it would give a legal title as against the assignor. *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325, just decided, and according to the case of *Duffield* v. *Elwes*, 1 Bligh, N. S. 497, 530, decided in the House of Lords. The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. See also to the same effect *Ex parte Pye*, 18 Ves. 140; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Richardson* v. *Richardson*, 3 Eq. Ca. 686. This trust, like this species of gift, is peculiar. The trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

This extended the law as laid down by Lord Hardwicke, in *Ward* v. *Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our courts have gone in the same direction with *Duffield* v. *Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causa*, courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. See last case; *Grover* v. *Grover*,

24 Pick. 261; *Chase* v. *Redding*, 13 Gray, 418; *Bates* v. *Kempton*, 7 Id. 382; and see also *Westerlo* v. *De Witt*, 36 N. Y. 340; *Walsh* v. *Sexton*, 55 Barb. 251.

The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A court of equity will compel the donor's representatives to produce the certificate, that the legal title to the stock may be perfected.

As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time. In this case the proof of the assignment, etc., is entirely clear, the question being as to its effect. The judgment should be affirmed, with costs to be paid out of the estate.

All concur: ALLEN, J., not voting. *Judgment affirmed.*[1]

PIERCE, ADMINISTRATOR *v.* BOSTON FIVE CENTS SAVINGS BANK.

129 Mass. 425. 1880.

THE first case[2] was an action of contract brought by Martin A. Munroe, in the name of the administrator of the estate of William Green, Jr., to recover deposits in the defendant bank made by Green to the amount of $600. Writ dated June 19, 1877. The bank defended the action at the request of the administrator. Trial in the Superior Court, without a jury, before GARDNER, J., who allowed a bill of exceptions, in substance as follows: —

There was evidence tending to show that the intestate delivered the bank book, issued to him by the defendant, to Munroe, for his own use, as a *donatio mortis causa*, but there was no assignment of the bank book by Green. Upon making the first deposit, Green subscribed to the by-laws of the defendant bank. Printed on the outside of the bank book was the direction, "If you lose this book, give immediate information to the treasurer"; and inside, among the printed by-laws, were the following: "Art. 8. It shall be the duty of the treasurer to enter all deposits and payments made to depositors in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher and the evidence of the amount deposited." "Art. 9. No person shall

[1] The principal case has been approved even where the certificate of stock was not indorsed. *Grimes* v. *Barndollar*, 148 Pac. (Col.) 256; *Leyson* v. *Davis*, 17 Mont. 220; *Commonwealth* v. *Crompton*, 137 Pa. 138. Compare *Hatcher* v. *Buford*, 60 Ark. 169. *Pennington* v. *Gittings*, 2 Gill & J. 208; *Ward* v. *Turner*, 1 Dick. 170, 2 Ves. Sr. 431; *Moore* v. *Moore*, L. R. 18 Eq. 474, *contra*. And see *In re Weston*, [1902] 1 Ch. 680.

[2] Two cases were reported together; only the first is here given.

receive any part of his principal or interest without producing the original book."

It appeared that the estate of Green, including said deposits, amounted to $1,242.87, and that the debts were $25.40, of which last sum $25 was for the services of the doctor during Green's last illness, and forty cents for some tobacco, both of which items had been paid, and that the funeral and other expenses did not exceed $150, unless the alleged donee, Munroe, was to be considered a creditor. Munroe testified that he had a legal claim against Green's estate of $1,300, for board furnished, and some expenses paid for Green; and on January 20, 1879, he commenced a suit against the administrator to recover said amount, which suit is now pending. Pierce was appointed administrator of Green's estate on January 29, 1877, and the estate was represented insolvent in October, 1879, and commissioners were appointed by the Probate Court.

The defendant requested the judge to rule, as matter of law, as follows: "1. The delivery of the bank book to Munroe by the deceased in his last illness, even if made when he did not expect to recover, and if intended by the deceased as a *donatio mortis causa*, did not pass to Munroe any right to the deposit in the bank. 2. It appearing, from the testimony in the case, that the only property left by the deceased, including the bank deposit, amounted to $1,242.87, and that the deceased, at the time of the alleged gift, owed Munroe $1,300 in addition to debts to other persons; that the deceased was insolvent at the time of the alleged gift, and of his death, and the gift of the bank deposit, if good in other respects, as *donatio mortis causa* was void, because in fraud of creditors."

The judge declined so to rule, and found for the plaintiff for the amount of the deposits and the interest accumulated thereon, according to the terms of the deposits, down to the date of the writ, with simple interest at six per cent from the date of the writ, against the objection of the defendant, who contended that by the terms of the deposit the interest from the date of the writ should be, if anything, only at the rate of two per cent semi-annually, being the rate payable according to the terms of the contract of deposit.

To the above refusals to rule, and to the allowance of interest at six per cent from the date of the writ, the defendant alleged exceptions.

ENDICOTT, J. It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman* v. *Perkins*, 105 Mass. 111; *Foss* v. *Lowell Five Cents Savings Bank*, 111 Mass. 285; *Kimball* v. *Leland*, 110 Mass. 325; *Sheedy* v. *Roach*, 124 Mass. 472; *Davis* v. *Ney*, 125 Mass. 590.

As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit.

and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable.

We have not had the question presented to us until now, whether the delivery of the book, without a written assignment or order, is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has, however, been decided in other jurisdictions in the affirmative.

It was held in *Parish* v. *Stone*, 14 Pick. 198, that the donor's own note payable to the donee was not the subject of a *donatio causa mortis*. But it was intimated in the opinion, that a promissory note of another person payable to bearer, or indorsed in blank, so as to pass by delivery, might be a good gift *causa mortis*, and that a mortgage given to secure it would pass as an inseparable incident to the debt, though not assigned, citing *Duffield* v. *Elwes*, 1 Bligh N. R 497; and *Duffield* v. *Hicks*, 1 Dow. & Cl. 1. See also *Runyan* v. *Mersereau*, 11 Johns. 534; *Chase* v. *Redding*, 13 Gray, 418; *Ford* v. *Stuart*, 19 Johns. 342.

In *Grover* v. *Grover*, 24 Pick. 261, the action was by an administrator on a promissory note, which, as appears by the statement of facts, was secured by a mortgage. The note and mortgage were given by the plaintiff's intestate to one Blanchard, in contemplation of death, without assignment. It was held that there may be a valid gift *inter vivos* of a promissory note, payable to the order of the donor, without indorsement or other writing by him. And it was said by Mr. Justice Wilde, in delivering the opinion, after reviewing the earlier English cases, "In coming to this conclusion, we concur with the decision in the case of *Wright* v. *Wright*, 1 Cowen, 598, wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment." See *Harris* v. *Clark*, 3 Comst. 93. It was also decided that Blanchard, on the death of the donor, could maintain an action against the maker of the note in the name of the administrator, without his assent. It was not necessary to decide whether the gift of the mortgage security was valid, as the right to maintain the action did not depend upon that question, though *Duffield* v. *Elwes* was referred to, as deciding that the gift of the debt operated as an equitable assignment of the mortgage.

In *Sessions* v. *Moseley*, 4 Cush. 87, it was said that "a note of hand of a third person, a security for money, or a chose in action, however it may have formerly been considered, is now held to be the proper subject of such a gift." And in *Bates* v. *Kempton*, 7 Gray, 382, it was decided, on the authority of these cases, that, by the law of Massachusetts, a negotiable note is the proper subject of such a gift without indorsement, and that the donee may maintain an action on it in the name of the administrator of the donor without

his consent. See also *Borneman* v. *Sidlinger*, 15 Maine, 429. So the delivery of bonds, or a policy of life insurance with the deposit note, have been held to constitute good gifts *mortis causa* without assignment of the instruments. *Snelgrave* v. *Baily*, 3 Atk. 214, per Lord Hardwicke; *Witt* v. *Amis*, 1 B. & S. 109; *Wells* v. *Tucker*, 3 Binn. 366; *Waring* v. *Edmonds*, 11 Md. 424.

The decision of Lord Hardwicke in *Ward* v. *Turner*, 2 Ves. Sen. 431, in which he held that the mere delivery of receipts for South Sea annuities was not sufficient to constitute a good gift *causa mortis*, distinguishing it from the case of *Snelgrave* v. *Baily*, was said by Mr. Justice Wilde, in *Grover* v. *Grover*, to be technical and unsatisfactory, and to have no application to our laws, which place bonds and other securities upon the same footing. In *Westerlo* v. *De Witt*, 36 N. Y. 340, the delivery of a certificate of deposit on the New York Life Insurance and Trust Company was held to be effectual, without a written assignment, to transfer the deposit itself to the donee as a *donatio causa mortis*. So a delivery to a donee of a savings-bank book containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, has been held to constitute a complete gift of such deposits, and that such delivery vests the equitable title in the donee without assignment. *Hill* v. *Stevenson*, 63 Maine, 364; *Tillinghast* v. *Wheaton*, 8 R. I., 536; *Camp's Appeal*, 36 Conn. 88; *Penfield* v. *Thayer*, 2 E. D. Smith, 305.

A savings-bank book has a peculiar character. It is not a mere pass-book,[1] or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay to the depositor the money in its hands except upon presentation of the book; and if in good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor. *Sweeney* v. *Boston Five Cents Savings Bank*, 116 Mass. 384; *Wall* v. *Provident Inst. for Savings*, 3 Allen, 96; *Levy* v. *Franklin Savings Bank*, 117 Mass. 448; *Goldrick* v. *Bristol County Savings Bank*, 123 Mass. 320.

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a

[1] Delivery of a pass-book of a commercial bank is ineffectual as a gift *mortis causa* of the deposit. *Jones* v. *Weakley*, 99 Ala. 441; *Allbrook* v. *Ryon*, 2 Bush 228 (*semble*); *Pace* v. *Pace*, 107 Miss. 292; *Thomas* v. *Lewis*, 89 Va. 1. But see *Stephenson* v. *King*, 81 Ky. 425, 433.

purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale. *Grover* v. *Grover*, 24 Pick. 261.

In the first of the cases now before us, the delivery of the bank book to Munroe, by Green, in his last sickness, without a written assignment, made in contemplation of death, and with the intent thereby to transfer the deposit in the bank to Munroe, constituted a valid *donatio mortis causa*, and Munroe may maintain an action against the bank for the amount of the deposit, in the name of Green's administrator, without his consent.

The judge properly refused to rule, upon the facts presented, that the gift to Munroe made the estate insolvent, and was therefore void because in fraud of creditors.

It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs, for strictly speaking the only property which a person by gift *causa mortis* or by will can voluntarily dispose of, without consideration, is the balance left after the payment of his debts. Munroe therefore, as donee *causa mortis*, took his title to the bank deposit subject to the right of the administrator to reclaim it, if required for the payment of debts. *Mitchell* v. *Pease*, 7 Cush. 350; *Chase* v. *Redding*, 13 Gray, 418. But, upon the facts in this case, Munroe is the only person against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him.

It appears that Pierce was appointed administrator in January, 1877, and that the estate of Green, not including the deposits in the bank, amounted to $642.87. This action was brought in June, 1877. In January, 1879, Munroe brought an action against the administrator, alleging that Green's estate was indebted to him in the sum of $1,300, for board of Green and other expenses paid for him. Pierce thereupon represented the estate as insolvent in October, 1879, and commissioners were appointed, but no further action seems to have been taken. The only debts besides the claim of Munroe amounted to $25 for the doctor's bill during Green's last sickness, and forty cents for some tobacco, which have both been paid. The funeral and other expenses did not exceed $150, but these are not debts within the meaning of the Statute in regard to the settlement of the estates of deceased persons. The expenses of the funeral, and of the last sickness, and the expenses attending the administration, we must presume to have been paid before the estate was declared insolvent. The doctor's bill would come within this category. Gen. Sts. c. 99, §. 1. Munroe therefore was the only creditor. If he should establish his claim against the estate for $1,300, he would be entitled only to what remains of the $642.87 after the above payments, and could make no claim against the administrator for funds in his own hands, by virtue of the gift from

Green. It would be an idle ceremony to have the bank deposit paid over to Pierce, the administrator, in order that he should deduct from it the claim of Munroe, pay him, and also return to him the balance.

As we understood the bill of exceptions, by the terms of the contract upon which the deposit was held by the defendant, the rate of interest thereon is four per cent *per annum*, payable semi-annually. This action is brought upon that contract, and the damages for the non-payment of the money are to be estimated at that rate, till the debt is merged in the judgment. *Brannon* v. *Hursell*, 112 Mass. 63; *Union Institution for Savings* v. *Boston*, 129 Mass. 82; *Miller* v. *Burroughs*, 4 Johns. Ch. 436; *Van Beuren* v. *Van Gaasbeck*, 4 Cowen, 496. The ruling of the presiding judge, that the plaintiff was entitled to six per cent from the date of the writ, was erroneous. If the plaintiff will remit the two per cent erroneously included in the verdict, the exceptions may be

Overruled.[1]

BASKET *v.* HASSELL.

107 U. S. 602. 1882.

Bill in equity in the Circuit Court of the United States for the District of Indiana, by Hassell, administrator of the estate of Chaney, against Basket and the Evansville National Bank. The single question was whether a fund represented by a certificate of deposit for $23,514.70, issued by the bank to Chaney, belonged to Basket, who claimed it as a gift from Chaney, and had possession of the certificate. Basket asserted his title not only by answer, but by a cross-bill. It appeared that Chaney, being in possession of the certificate, during his last illness and in apprehension of death wrote on the back of the certificate this indorsement: —

Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. M. M. Chaney.

The Circuit Court ordered that the certificate of deposit be surrendered to Hassell, and Basket appealed.[2]

Mr. Justice Matthews delivered the opinion of the court.

[After stating the earlier decisions, the learned judge continued as follows: — Ed.] The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of

[1] *Curtis* v. *Portland Savings Bank*, 77 Me. 151; *In re Morse's Estate*, 170 Mich. 114; *Van Wagenen* v. *Bonnot*, 65 Atl. (N. J.) 239; *Ridden* v. *Thrall*, 125 N. Y. 572; *Tillinghast* v. *Wheaton*, 8 R. I. 536; *In re Weston*, [1902] 1 Ch. 680, *accord*. But see *Walsh's Appeal*, 122 Pa. 177; *M'Connell* v. *Murray*, Ir. R. 3 Eq. 460. Compare *Conser* v. *Snowden*, 54 Md. 175; *Stratton* v. *Athol Savings Bank*, 213 Mass. 46; *Schippers* v. *Kempkes*, 67 Atl. (N. J.) 74.

[2] This short statement, which is taken from 4 Gray, Cas. on Prop. (2d ed.), p. 725, is substituted for that in the report.

a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa;* and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell* v. *Hellicar*, 26 Beav. 261; *Reddel* v. *Dobree*, 10 Sim. 244; *Farquharson* v. *Cave*, 2 Colly. C. C. 356; *Hatch* v. *Atkinson*, 56 Me. 324; *Bunn* v. *Markham*, 7 Taunt. 224; *Coleman* v. *Parker*, 114 Mass. 30; *Wing* v. *Merchant*, 57 Me. 383; *McWillie* v. *Van Vacter*, 35 Miss. 428; *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Michener* v. *Dale*, 23 Pa. St. 59.

The application of these principles to the circumstances of the present case requires the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It cannot be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during

the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even where it is payable *in presenti*, unless paid or accepted while the donor is alive; how much less so, when, as in the present case, it is made payable only upon his death.

The case is not distinguishable from *Mitchell* v. *Smith*, 4 De G., J. & S. 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath — pay the within contents to Simon Smith, or his order, at my death." Lord Justice Turner said: "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the meantime the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is accordingly

Affirmed.[1]

[1] On gifts *mortis causa* of certificates of deposit payable to donor's order and unindorsed by him, see *Lowe* v. *Hart*, 93 Ark. 548; *Conner* v. *Rood*, 11 Col. 183, *In re Morse's Estate*, 170 Mich. 114; *Westerlo* v. *DeWitt*, 36 N. Y. 340; *Christensen* v. *Christopher*, 157 Wis. 525; *Amis* v. *Witt*, 33 Beav. 619. Compare *Philpot* v. *Temple Banking Co.*, 3 Ga. App. 742; *State Bank* v. *Johnson*, 151 Mich. 538; *In re Dillon*, 44 Ch. D. 76.

There can be no gift *mortis causa* of real estate. *Wentworth* v. *Shibles*, 89 Me. 167, 171; *Houghton* v. *Houghton*, 34 Hun 212; *In re Heiser's Estate*, 147 N. Y. Supp. 558 (*semble*); *Meach* v. *Meach*, 24 Vt. 591. But see *Curtiss* v. *Barrus*, 38 Hun 165.

The gift may extend to all the personal property of the donor. *Meach* v. *Meach*, 24 Vt. 591. *Headley* v. *Kirby*, 18 Pa. 326, *contra*.

There can be a gift *mortis causa* although the donee is already in possession of the property. *Caylor* v. *Caylor*, 22 Ind. App. 666; *Davis* v. *Kuck*, 93 Minn. 262; *Cain* v. *Moon*, [1896] 2 Q. B. 283. *Drew* v. *Hagerty*, 81 Me. 231; *McCord* v. *McCord*, 77 Mo. 166; *Cutting* v. *Gilman*, 41 N. H. 147, *contra*.

A written declaration of gift made by donor and delivered to donee, without the delivery of the subject matter, is ineffectual as a gift *mortis causa*. *McGrath* v. *Reynolds*, 116 Mass. 566; *Trenholm* v. *Morgan*, 28 S. C. 268. And see *Knight* v. *Tripp*, 121 Cal. 674; *Smith* v. *Downey*, 3 Ired. Eq. 268. But compare *Ellis* v. *Secor*, 31 Mich. 185; *Kenistons* v. *Sceva*, 54 N. H. 24.

Delivery by decedent of the key of his safe-deposit box may be sufficient delivery of the contents to satisfy the requirements of a gift *mortis causa*. *Harrison* v. *Foley*, 206 F. R. 57; *Foley* v. *Harrison*, 233 Mo. 460. And see *Stephenson* v. *King*, 81 Ky. 425; *Debinson* v. *Emmons*, 158 Mass. 592; *Scott* v. *Union Bank*, 123 Tenn. 258; *Thomas* v. *Lewis*, 89 Va. 1. Compare *Hateh* v. *Atkinson*, 56 Me. 324, 329; *Keepers* v. *Fidelity Co.*, 56 N. J. L. 302; *Apache State Bank* v. *Daniels*, 32 Okl. 121; *Newsome* v. *Allen*, 86 Wash. 678. The authorities are collected in 1914 A Am. & Eng. Ann. Cas. 529 note.

On delivery of only part of the property where a gift *mortis causa of* the whole was intended, see *Knight* v. *Tripp*, 121 Cal. 674; *McGrath* v. *Reynolds*, 116 Mass. 566. On delivery of more than was intended, see *Crippen* v. *Adams*, 92 N. W. (Mich.) 496.

On delivery in general, see 2 Am. & Eng. Ann. Cas. 1003 note; 18 L. R. A. 170 note; 10 Prob. Rep. Ann. 385 note.

The gift must be made when the donor is under the apprehension of death from some existing disease or infirmity; but the donor need not be *in extremis*. *Taylor* v. *Harmison*, 79 Ill. App. 380; *Williams* v. *Guile*, 117 N. Y. 343; *Ridden* v. *Thrall*, 125 N. Y. 572; *Nicholas* v. *Adams*, 2 Whart. 17; *Sheehog* v. *Perkins*, 4 Baxt. 273. On the effect of temporary recovery, see *Castle* v. *Parsons*, 117 F. R. 835; *Weston* v. *Hight*, 17 Me. 287. A gift by soldier about to start for the war was held invalid as a gift *mortis causa* in *Smith* v. *Dorsey*, 38 Ind. 451; *Gourley* v. *Linsenbigler*, 51 Pa. 345. But see *Baker* v. *Williams*, 34 Ind. 547; *Gass* v. *Simpson*, 4 Cold. 288. And so a gift in contemplation of suicide. *Agnew* v. *Belfast Banking Co.*, [1896] 2 Ir. R. 204. See *Bainbridge* v. *Hoes*, 149 N. Y. Supp. 20.

The same degree of mental capacity is required to make a gift *mortis causa* as is required to make a will. *Sass* v. *McCormack*, 62 Minn. 234. On the burden of proof of fraud or undue influence of the donee, see *Vandor* v. *Roach*, 73 Cal. 614; *Gilmore* v. *Lee*, 237 Ill. 402.

A gift *mortis causa* may be revoked by the recovery of the donor from his disorder. 1 Woerner, Am. Law Adm. (2d ed.), §§ 60, 62; 1 Williams, Exec. (10th ed.), pp. 592, 600. Or by his act during his life. *Adams* v. *Atherton*, 132 Cal. 164; *Merchant* v. *Merchant*, 2 Bradf. Sur. 432; *O'Gorman* v. *Jolley*, 34 S. D. 26, 34. Or by the death of the donee before the donor. *Lisle* v. *Tribble*, 92 Ky. 304 (*semble*). But a subsequent will of the donor which disposes of the subject matter of the gift in favor of another does not necessarily amount to a revocation. *Brunson* v. *Henry*, 140 Ind. 455 (*semble*); *Hoehn* v. *Struttman*, 71 Mo. App. 399; *Nicholas* v. *Adams*, 2 Whart. 17; *Hudson* v. *Spencer*, [1910] 2 Ch. 285. Compare California, Civ. Code (1915), § 1152; *Jones* v. *Selby*, Prec. Ch. 300, 304. *Jayne* v. *Murphy*, 31 Ill. App. 28, *contra*.

On the revocation of a gift *mortis causa* by the birth of a child of the donor, see *Bloomer* v. *Bloomer*, 2 Bradf. Sur. 339.

The law of the place where a gift *mortis causa* is made, not the law of the domicil of the donor, determines its validity. *O'Neil* v. *O'Neil*, 43 Mont. 505; *Emery* v. *Clough*, 63 N. H. 552.

APPENDIX OF SELECTED FORMS.

A. ILLINOIS.

INVENTORY.

State of Illinois, } ss.
County of Cook }

IN THE PROBATE COURT OF COOK COUNTY

In the Matter of the Estate of }
Joseph N. Weeks, Deceased. }

INVENTORY

To the Honorable Morton Field, Judge of said Court:

The undersigned, Stanley Weeks and Arthur B. Royce, executors of the estate of Joseph N. Weeks, deceased, respectfully state to the court that the following is a full, true and perfect inventory of all the estate, both real, personal and mixed, situated in the State of Illinois and belonging to said Joseph N. Weeks, deceased, at the time of his death which has come to the possession, knowledge or control of the undersigned:

Item No.

PERSONAL PROPERTY

1.	Goods and Chattels as per appraisement[1]	$10,000.40
2.	Open account with Floyd Weeks & Company, considered good..	90,457.05

[1] The practice in Illinois is for the appraisers only to appraise the tangible chattels of the deceased. The form of the appraisement is sufficiently indicated by the following:

A Bill of Appraisement of the estate of Joseph N. Weeks, late of the County of Cook and State of Illinois, *deceased*.

2000 Books	at 20¢	$400.00
1 Sofa		20.00
2 Morris Chairs	at $10.00	20.00
1 Sofa		15.00
1 Large Chair		10.00
6 Chairs	at $5.00	30.00
1 Desk		10.00
4 Small Rugs	at $25.00	100.00
1 Small Table		10.00
1 Large Table		20.00
13 Vases	at $5.00	65.00
2 Bronze Vases	at $20.00	40.00
1 Large Plaque		20.00
1 Large Rug		20.00
. . . . .		. . . . .
Total		$10,000.40

We, the undersigned, appraisers of the estate of Joseph N. Weeks, deceased, do hereby certify that the above and foregoing is a full, just and impartial appraisement of the personal estate of said deceased, subject to appraisement, so far as the same has come to our sight and knowledge.

Witness our hands and seals this 20th day of April, 1914.

William Robinson (Seal)
Strafford King (Seal) Appraisers.
Lucius O'Brien (Seal)

(The appraisers have already taken an oath to perform their duty)

STOCKS.

Item No.	Number of Shares and kind of Stock.	NAME OF CORPORATION. PLACE OF INCORPORATION. PAR VALUE PER SHARE.	Par Value.

CHICAGO & NORTH WESTERN RAILWAY COMPANY.

3. 1,200 *Michigan, Wisconsin and Illinois.*

Preferred. One Hundred Dollars ($100) per Share. $120,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
011406	50	032719	100	032722	100	032843	100
etc.		etc.		etc.		etc.	

CHICAGO & NORTH WESTERN RAILWAY COMPANY.

4. 11,000 *Michigan, Wisconsin and Illinois.*

Common. One Hundred Dollars ($100) per Share. 1,100,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
035471	80	082653	100	102916	100	108343	100
etc.		etc.		etc.		etc.	

CHICAGO RAILWAYS COMPANY.

5. 600 Parts. *Illinois.*

Series 1 Partic. Ctfs. One Hundred Dollars ($100) per Part. 60,000

Ctf. Nos.	No. of Parts.	Ctf. Nos.	No. of Parts.	Ctf. Nos.	No. of Parts.	Ctf. Nos.	No. of Parts.
J 136	100	J 138	100	J 140	100	K 587	4
J 137	100	J 139	100	K 195	96		

COMMONWEALTH EDISON COMPANY.

Illinois.

6. 2,000 One Hundred Dollars ($100) per Share. 200,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
1283	50	19366	40	A 1405	100	A 3516	100
etc.		etc.		etc.		etc.	

200 Ctf. No. 427 for subscription for 200 shares of new stock, at par, which has been fully paid for and to be issued August 1st. 20,000

CHICAGO CITY and CONNECTING RAILWAYS COLLATERAL TRUST.

7. 1,460 *Illinois.*

Trustees' Certificate of Preferred Participation. One Hundred Dollars ($100) per Share. 146,000

Ctf. Nos.	No .of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
0213	60	2222	100	2225	100	2228	100
etc.		etc.		etc.		etc.	

Item No.	Number of Shares and kind of Stock.	NAME OF CORPORATION. PLACE OF INCORPORATION. PAR VALUE PER SHARE.	Par Value.

CHICAGO CITY and CONNECTING RAILWAYS COLLATERAL TRUST.

8. 876 *Illinois.*

Trustees' Certificate of Common Participation. One Hundred Dollars ($100) per Share. $87,600

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
0206	76	1304	100	1306	100	1308	100
etc.		etc.		etc.		etc.	

ILLINOIS CENTRAL RAILROAD COMPANY.

Illinois.

9. 3,400 One Hundred Dollars ($100) per Share. 340,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
H 18638	100	H 28959	100	H 48693	100	H 55376	100
etc.		etc.		etc.		etc.	

ILLINOIS TRUST & SAVINGS BANK.

Illinois.

10. 1,500 One Hundred Dollars ($100) per Share. 150,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
502	200	2254	50	2441	100	2490	100
etc.		etc.		etc.		etc.	

FLOYD WEEKS & COMPANY.

Illinois.

11. 4,200 One Hundred Dollars ($100) per Share. 420,000

Ctf. Nos.	No. of Shares.
20	4200

THE MERCHANTS' LOAN & TRUST COMPANY.

Illinois.

12. 149 One Hundred Dollars ($100) per Share. 14,900

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
1620	50	1622	22	1623	50	1652	27

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS.

13. 200 *Illinois.*

Preferred. One Hundred Dollars ($100) per Share. 20,000

Ctf. Nos.	Nos. of Shares.	Ctf. Nos.	No. of Shares.
C 844	100	C 845	100

Item No.	Number of Shares and kind of Stock.	NAME OF CORPORATION. PLACE OF INCORPORATION. PAR VALUE PER SHARE.	Par Value.

THE PULLMAN COMPANY.

Illinois.

14. 6,200 One Hundred Dollars ($100) per Share. $620,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
202	100	5999	100	C 40	100	C 118	100
etc.		etc.		etc.		etc.	

STOCKS — OF LITTLE OR NO VALUE.

IRON SILVER MINING COMPANY.

New York.

15. 2,000 Twenty Dollars ($20) per Share. 40,000

Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.	Ctf. Nos.	No. of Shares.
41	200	43	200	45	200
42	200	44	200	1165	1000

BONDS.

Item No.	Number.	NAME OF CORPORATION. PLACE OF INCORPORATION.	Par value.

CHICAGO GAS LIGHT & COKE COMPANY.

Illinois.

Five Per Cent First Mortgage Bonds, dated July 1, 1887, due July 1, 1937; interest payable January 1 and July 1, paid to January 1, 1914, being of the denomination of $1,000 each, numbered as follows:

16. 19 19,000

294 5279 7305 9010 9454 9514 9516 9518 9891 9942
1968 7304 7857 9185 9491 9515 9517 9726 9911

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Iowa.

Four Per Cent General Mortgage Gold Coupon Bonds, dated January 1, 1898, due January 1, 1988; interest payable January 1 and July 1, paid to January 1, 1914, being of the denomination of $1,000 each, numbered as follows:

17. 31 31,000

30500 41468 43206 49504 49784 49978 50555 52939
etc. etc. etc. etc. etc. etc. etc. etc.

UNITED STATES GOVERNMENT PANAMA CANAL.

Three Per Cent Coupon Bonds of 1911, due June 1, 1961; interest payable March 1, June 1, September 1 and December 1, paid to March 1, 1914, being of the denomination of $1,000 each, and numbered as follows:

18. 79 79,000

24689 24843 24901 24988 25002 25052 25060 25068
etc. etc. etc. etc. etc. etc. etc. etc.

Item No.	Number.	NAME OF CORPORATION. PLACE OF INCORPORATION.	Par Value.

UNITED STATES GOVERNMENT.

Three Per Cent Coupon Bonds of 1908, due August 1, 1918; interest payable February 1, May 1, August 1 and November 1, paid to February 1, 1914.

19. 97 Seventy-four (74) of which bonds are of the denomination of $500 each, numbered as follows: $60,000

51129 59395 81896 97737 102485 122254 149590 163562
etc. etc. etc. etc. etc. etc. etc. etc.

Twenty-three (23) of which bonds are of the denomination of $1,000 each, numbered as follows:

34986 37052 40277 46611 51498 52349 62575
etc. etc. etc. etc. etc. etc. etc.

UNITED STATES GOVERNMENT.

Four Per Cent Registered Bonds of 1895, due February 1, 1925; interest payable February 1, May 1, August 1 and November 1, paid to May 1, 1914.

20. 41 405,000

Forty (40) of which bonds are of the denomination of $10,000 each, numbered as follows:

46298 46302 46306 46310 46314 46318 46322 46326 46330 46334
etc. etc. etc. etc. etc. etc. etc. etc. etc. etc.

And one (1) of which bonds is of the denomination of $5,000, and numbered: 7736

UNITED STATES GOVERNMENT.

Three Per Cent Registered Bonds of 1908, due August 1, 1918; interest payable February 1, May 1, August 1 and November 1, paid to May 1, 1914, being of the denomination of $10,000 each, and numbered as follows:

21. 20 200,000

23280 23282 23284 23286 23288 23290 23292 23294 23296 23298
23281 23283 23285 23287 23289 23291 23293 23295 23297 23299

UNITED STATES GOVERNMENT PANAMA CANAL.

Three Per Cent Registered Bonds of 1911, due June 1, 1961; interest payable March 1, June 1, September 1 and December 1, paid to March 1, 1914.

22. 8 35,000

Three (3) of which bonds are of the denomination of $10,000 each, and numbered as follows:

822 823 824

Five (5) of which bonds are of the denomination of $1,000 each, and numbered as follows:

60300 60301 60302 60303 60304

ALL OF SAID BONDS ARE DEEMED GOOD.

NOTES.

Item No.	NAME OF MAKER.	Rate of Interest.	Amount of Principal.
	KNOWLES, LUCY E. and JESSIE B.	6%	$15,000

23. Note, dated September 8, 1888, due September 8, 1891, for $20,000.00 on which $5,000.00 was paid August 28, 1898; interest payable semi-annually on September 8 and March 8 and paid to March 8, 1912.

Secured by mortgage on real estate in Cook County, Illinois. Foreclosure proceedings pending. Considered doubtful.

REAL ESTATE.

25. The East half (E. ½) of Lot Eight (8) in Block One Hundred Thirty (130) in School Section Addition to Chicago, in Section Sixteen (16), Township Thirty-nine (39), North, Range Fourteen (14), East of the Third Principal Meridian.

Title fee simple, unencumbered. Derived by deed from Abraham J. Mills, a bachelor, dated December 1, 1880, recorded in Book 1094 of Records, page 148. Said premises are subject to a lease to the Michigan Safety Deposit Company, dated April 28, 1902, for a term of one hundred and ninety-eight (198) years from May 1, 1902, to April 30, 2100, at a net annual rental of $18,000, payable in quarter-yearly installments, in advance on the first day of each of the months of May, August, November and February in each year. An agreement between Joseph N. Weeks, the Michigan Safety Deposit Company and the Commercial National Safe Deposit Company, modifying lease dated April 28, 1902, from Joseph N. Weeks to the Michigan Safety Deposit Company, and containing assignment to Commercial National Safe Deposit Company, of lessee's estate under said lease, dated May 1st, 1905, recorded in the Recorder's Office of Cook County, Illinois, on September 5, 1905, as Document No. 3747854. Said property has a frontage of forty-five (45) feet, three (3) inches on Porter Street, and a depth of one hundred and ninety (190) feet to Regent Place, and is improved with a part of the nineteen (19) story building known as the new Commonwealth Company's Building, known as Nos. 64 and 66 West Porter Street.

(Other items of real estate follow in similar form.)

Respectfully submitted, May 14th, 1914.

STANLEY WEEKS,
ARTHUR B. ROYCE,
Executors of the Estate of
JOSEPH N. WEEKS, *deceased.*

ACCOUNT.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE PROBATE COURT OF COOK COUNTY.

In the Matter of the Final Settlement of the Estate of JOSEPH N. WEEKS, Deceased.

FINAL ACCOUNT.

TO THE HONORABLE MORTON FIELD, JUDGE OF SAID COURT:

The undersigned, Stanley Weeks and Arthur B. Royce, executors of the estate of Joseph N. Weeks, deceased, respectfully submit herewith the following final account of their receipts and disbursements as such executors.

Item No.	RECEIPTS.	
1.	Apr. 29, 1914, Goods and chattels as per appraisement.....	$10,000.40
2.	Apr. 29, 1914, Cash in settlement of open account with Floyd Weeks & Company.....	90,457.05
	Dec. 31, 1914, Cash interest on above account.....	1,701.12
	STOCKS.	
3.	Apr. 29, 1914, 1200 shares of the preferred capital stock of the Chicago & Northwestern Railway Co.; inventoried at $100 per share.....	120,000.00
	July 2, 1914, Cash dividend on above stock..... $2400	
	Oct. 2, " " " " " " 2400	
	Jan. 2, 1915, " " " " " " 2400	
	Apr. 2, " " " " " " 2400	
	July 2, " " " " " " 2400	
	Oct. 2, " " " " " " 2400	
		14,400.00
4.	Apr. 29, 1914, 11,000 shares of the common capital stock of the Chicago & Northwestern Railway Co.; inventoried at $100 per share.....	1,100,000.00
	July 2, 1914, Cash divided on above shares..... $19,250	
	Oct. 2, " " " " " " 19,250	
	Jan. 4, 1915, " " " " " " 19,250	
	Apr. 2, " " " " " " 19,250	
	July 2, " " " " " " 19,250	
	Oct. 2, " " " " " " 19,250	
		115,500.00
5.	Apr. 29, 1914, 600 parts. of Series 1 Participation Certificates of Chicago Railways Company; inventoried at $100 per part.....	60,000.00
	Aug. 3, " Cash dividend on above parts..... $4800	
	June 7, 1915, " " " " " 2400	
	Sept. 3, " " " " " " 2400	
		9,600.00

Item No.			
6.	Apr. 29, 1914, 2200 shares of the capital stock of the Commonwealth Edison Company; inventoried at $100 per share		$220,000.00
	May 1, 1914, Cash dividend on above shares	$4000	
	Aug. 1, " " " " " "	4000	
	Nov. 4, " " " " " "	4400	
	Feb. 1, 1915, " " " " " "	4400	
	May 1, " " " " " "	4400	
	Aug. 2, " " " " " "	4400	
			25,600.00
	May 1, 1914–August 1, 1914, cash interest on subscription to 200 shares of above stock, which stock was issued August 1, 1914		684.93
7.	Apr. 29, 1914, 1460 shares of Trustees' Certificate of preferred Participation of Chicago City & Connecting Railways Collateral Trust; inventoried at $100 per share		146,000.00
	July 1, 1914, Cash dividend on above shares	$3285	
	Jan. 4, 1915, " " " " " "	1825	
	July 1, " " " " " "	1825	
			6,935.00
8.	Apr. 29, 1914, 876 shares of Trustees' Certificate of common Participation of Chicago City & Connecting Railways Collateral Trust; inventoried at $100 per share		87,600.00
	(No dividends have been paid on the above stock.)		
9.	Apr. 29, 1914, 3400 shares of the capital stock of the Illinois Central Railroad Company; inventoried at $100 per share		340,000.00
	Sept. 4, 1914, Cash dividend on above shares	$8500	
	Mar. 1, 1915, " " " " " "	8500	
	Sept. 2, " " " " " "	8500	25,500.00
10.	Apr. 29, 1914, 1500 shares of the capital stock of the Illinois Trust & Savings Bank; inventoried at $100 per share		150,000.00
	May 20, 1914, Cash dividend on above shares	$1500	
	July 1, " " " " " "	6000	
	Aug. 20, " " " " " "	1500	
	Oct. 2, " " " " " "	6000	
	Nov. 20, " " " " " "	1500	
	Jan. 4, 1915, " " " " " "	6000	
	Feb. 20, " " " " " "	1500	
	Apr. 1, " " " " " "	6000	
	May 20, " " " " " "	1500	
	July 1, " " " " " "	6000	
	Aug. 20, " " " " " "	1500	
	Oct. 1, " " " " " "	6000	
			45,000.00

Item No.			
11.	Apr. 29, 1914, Cash proceeds from sale of 4200 shares of the capital stock of Floyd Weeks & Company, payment of which was deferred		$2,569,650.56
	Dec. 31, 1914, to Mar. 29, 1915, Cash interest on deferred payments covering purchase of said shares.		92,818.39
12.	Apr. 29, 1914, 149 shares of the capital stock of the Merchants Loan & Trust Company; inventoried at $100 per share		14,900.00
	July 1, 1914, Cash dividend on above shares	$596	
	Oct. 2, " " " " " "	596	
	Jan. 4, 1915, " " " " " "	596	
	Apr. 1, " " " " " "	596	
	July 1, " " " " " "	596	
	Oct. 1, " " " " " "	596	
			3,576.00
13.	Apr. 29, 1914, 200 shares of the preferred capital stock of Public Service Company of Northern Illinois; inventoried at $100 per share		20,000.00
	May 1, 1914, Cash dividend on above shares	$300	
	Aug. 1, " " " " " "	300	
	Nov. 4, " " " " " "	300	
	Feb. 1, 1915, " " " " " "	300	
	May 1, " " " " " "	300	
	Aug. 2, " " " " " "	300	
			1,800.00
14.	Apr. 29, 1914, 6200 shares of the capital stock of the Pullman Company; inventoried at $100 per share		620,000.00
	May 15, 1914, Cash dividend on above shares	$12400	
	Aug. 16, " " " " " "	12400	
	Nov. 16, " " " " " "	12400	
	Feb. 15, 1915, " " " " " "	12400	
	May 15, " " " " " "	12400	
	Aug. 16, " " " " " "	12400	
			74,400.00
15.	Apr. 29, 1914, 2000 shares of the capital stock of the Iron Silver Mining Company; inventoried at $20 per share		40,000.00
	July 1, 1914, Cash dividend on above shares	$200	
	Dec. 31, " " " " " "	200	
	July 1, 1915, " " " " "	200	
			600.00
	BONDS.		
16.	Apr. 29, 1914, 19 5% first mortgage bonds of the Chicago Gas Light & Coke Co., dated July 1, 1887, due July 1, 1937, being of the face value of $1000 each		19,000.00
	June 29, 1914, Cash interest on above bonds	$475	
	Dec. 31, " " " " " "	475	
	June 30, 1915, " " " " "	475	
			1,425.00

Item No.		
17.	July 1, 1915, Cash proceeds from the sale of 31 4% general mortgage gold coupon bonds of the Chicago, Rock Island & Pacific Railway Co., dated Jan. 1, 1898, due Jan. 1, 1988, being of the face value of $1000 each.....	$27,125.00
	June 29, 1914, Cash interest on above bonds..... $619.70	
	Dec. 31, 1914, " " " " " 619.70	
	June 30, 1915, " " " " " 619.70	
	———	1,859.10
18.	Sept. 1, 1915, Cash proceeds from the sale of 79 3% United States Government Panama Canal coupon bonds of 1911, due June 1, 1961, being of the face value of $1000 each.....	79,000.00
	June 9, 1914, Cash interest on above bonds..... $592.50	
	Sept. 1, " " " " " " 592.50	
	Dec. 1, " " " " " " 592.50	
	Feb. 27, 1915, " " " " " 592.50	
	May 29, " " " " " " 592.50	
	Aug. 31, " " " " " " 592.50	
	———	3,555.00
19.	Apr. 29, 1914, 97 3% United States Government coupon bonds of 1908, due August 1, 1918; 74 of which bonds are of the face value of $500 each and 23 of which bonds are of the face value of $1000 each.....	60,000.00
	June 9, 1914, Cash interest on above bonds..... $450.00	
	Aug. 5, " " " " " " 450.00	
	Nov. 4, " " " " " " 450.00	
	Jan. 30, 1915, " " " " " 450.00	
	Apr. 30, " " " " " " 450.00	
	Aug. 3, " " " " " " 450.00	
	———	2,700.00
20.	Apr. 29, 1914, 41 4% United States Government registered bonds of 1895, due Feb. 1, 1925; 40 of which bonds are of the face value of $10,000 each and 1 of which bonds is of the face value of $5000.....	405,000.00
	Aug. 3, 1914, Cash interest on above bonds..... $4050.00	
	Nov. 4, " " " " " " 4050.00	
	Feb. 8, 1915, " " " " " 4050.00	
	May 1, " " " " " " 4050.00	
	Aug. 2, " " " " " " 4050.00	
	———	20,250.00
21.	Oct. 15, 1915, Cash proceeds from the sale of 20 3% United States Government registered bonds of 1908, due Aug. 1, 1918, being of the face value of $10,000 each.....	202,000.00

Item No.			
	Aug. 3, 1914, Cash interest on above bonds.....	$1500.00	
	Nov. 4, " " " " " "	1500.00	
	Feb. 8, 1915, " " " " " "	1500.00	
	May 1, " " " " " "	1500.00	
	Aug. 2, " " " " " "	1500.00	
	Oct. 15, " Accrued interest at date of sale.....	1250.00	
			$8,750.00
22.	Apr. 29, 1914, 8 3% United States Government Panama Canal registered bonds of 1911; due June 1, 1961; three of which bonds are of the face value of $10,000 each and five of which bonds are of the face value of $1000 each.....		35,000.00
	June 3, 1914, Cash interest on above bonds.....	$262.50	
	Sept. 4, " " " " " "	262.50	
	Dec. 1, " " " " " "	262.50	
	Mar. 1, 1915, " " " " "	262.50	
	Jan. 1, " " " " " "	262.50	
	Sept. 2, " " " " " "	262.50	
			1,575.00
23.	Apr. 29, 1914, The foreclosure proceedings upon the mortgage of Lucy E. and Jesse B. Knowles, which were pending at the date of the filing of inventory of this estate, were perfected and the property was bid in by the Executors for $20,000. A deficiency decree was entered against Charles S. Martin for $743.46, on account of which $200 was paid March 26, 1915:		
	Deficiency Decree.....	$743.46	
	Cash on account of said decree.....		200.00
	Balance due.....		543.46
	Feb. 9, 1915, Cash received from Floyd Weeks & Company in satisfaction of certain obligations to said decedent.....		22,878.70
	" " " Cash interest on above amount.....		148.72
	June 5, 1914, Cash received from Floyd Weeks & Company for refund on account of over-payment by decedent in his lifetime.....		31.57
	Nov. 30, 1914, to Sept. 30, 1915, Cash interest allowed by The Northern Trust Company on daily balances..		76.24
	Oct. 15, 1915, Cash interest allowed by Floyd Weeks & Company upon open account.....		1,499.98
	Total Receipts.....		$6,899,341.22

DISBURSEMENTS.

Vouchers.			
1914			
1.	June 9, Cash paid Merchants Loan & Trust Co. for interest and expenses in connection with the purchase of bonds made by decedent in his lifetime.		$171.61

Vouchers.

2.	June	13, Cash paid Dr. William R. Small for professional services	$98.46
3.	"	13, Cash paid Stroud, Coffin & Co. for funeral expenses	328.11
4.	"	13, Cash paid Kate Weeks for sundry bills paid	219.00
5.	May	19, Cash paid Floyd Weeks & Company for cables and marconigrams	28.98
6.	June	16, Cash paid Floyd Weeks & Company for one dozen napkins	47.50
7.	"	19, Cash paid C. H. Claflin & Co. funeral expenses	85.00
8.	July	20, Cash paid Charles Miller for masonry work on vault	19.75
9.	Dec.	18, Cash paid Ross Bible Institute of Chicago in payment of a subscription made by decedent in his lifetime	50,000.00
10.	Apr.	30, Cash paid William L. O'Connell, County Collector, for real estate taxes	23,380.85
11.	June	26, Cash paid Julius F. Smietanka, Collector, for 1913 income tax	6,184.93
	1915		
12.	June	28, Cash paid Julius F. Smietanka, Collector, for 1914 income tax	22,004.89
13.	Sept.	13, Cash paid Julius F. Smietanka, Collector, for additional 1913 income tax	388.34
	1914		
14.	Oct.	28, Cash paid William L. O'Connell, County Treasurer, for Illinois Inheritance Tax	172,949.64
	1915		
15.	Apr.	26, Cash paid H. G. Rinder, Dane County Treasurer, for Wisconsin Inheritance Tax	12,684.43
	1914		
16.	Nov.	16, Cash paid Knox & Co., for four rubber stamps	4.50
17.	Nov.	25, Cash paid The Rand Press for ledger, journal and vouchers	30.50
	1915		
18.	Jan.	6, Cash paid The Rand Press for balance sheets and binder	$9.85
19.	Apr.	22, Cash paid Ella R. Minton for services as stenographer	100.00
20.	Feb.	22, Cash paid Ward, Steele & McGibbon for fees, costs and expenses in connection with foreclosure suit against Charles S. Martin and others	848.30
21.	Sept.	30, Cash paid Ward, Steele & McGibbon for legal services and expenses in connection with the administration of this estate	15,212.36
22.	May	1, Cash paid Henry Stalling for 1914 real estate taxes on Ford Avenue property, in connection with foreclosure proceedings of said property	651.60
22-A.	June	1, Cash paid Russell & Co. for premium for insurance on Ford Avenue property	81.00
	1914		
	Nov.	2, Cash paid to the following in full satisfaction of the legacies given to them under the Third Article of the will of said decedent:	

Vouchers.			
23.		Philip Rice	$10,000.00
24.		Dwight Rice	10,000.00
25.		Bertha Williams	10,000.00
26.		Ethel Weeks James	10,000.00
27.		Grace Rice Condon	10,000.00
28.		Minna Weeks Barnes	10,000.00
29.		Frances Williams	10,000.00
30.		Florence Weeks Dalton	10,000.00
31.	Nov. 2,	Cash paid Paula Staub in full satisfaction of the legacy given to her under the Fifth Article of the will of said decedent	10,000.00
32.	" "	Cash paid Arthur B. Royce in full satisfaction of the legacy given to him under the Sixth Article of the will of said decedent	10,000.00
33.	" "	Cash paid Ida M. Toll in full satisfaction of the legacy given to her under the Seventh Article of the will of said decedent	2,000.00
	1914		
34.	Nov. 30,	Cash paid Ella Janvrin in full satisfaction of the legacy given to her under the Eighth Article of the will of said decedent	1,471.50
35.	Dec. 31,	Cash paid Stanley Weeks and Arthur B. Royce, trustees, in payment of bequest given to them as trustees under the codicil to the will of said decedent	500,000.00
	1915		
36.	July 1,	Cash paid James Castle, Treasurer of the Young Men's Christian Association, on account of subscription made by decedent in his lifetime	10,000.00
37.	Oct. 1,	Cash paid Young Men's Christian Association on account of subscription made by decedent in his lifetime	10,000.00
	1914		
38.	Dec. 18,	Cash deposited in the Illinois Trust & Savings Bank for the account of Mrs. Kate Weeks in satisfaction of her widow's award	25,000.00
		Cash paid to Stanley Weeks and Arthur B. Royce, trustees, under the Tenth Article of said will, in partial distribution of the estate on the following dates and in the amounts designated:	
	1915		
39.	Jan. 4		79,376.75
40.	" 5		5,707.50
41.	" 15		23,250.00
42.	" 18		97,185.00
43.	" 20		6,806.25
44.	" 21		61,650.00
45.	" 25		408.37
46.	" 27		5,465.00

Vouchers.

47.	Jan.	29	$15,575.25
48.	Feb.	4	12,569.50
49.	"	5	3,005.75
50.	"	6	18,444.38
51.	"	8	13,662.50
	1915		
52.	Feb.	9	27,235.50
53.	"	10	42,721.25
54.	"	13	15,212.50
55.	"	18	500,000.00
56.	Mar.	5	102,220.83
57.	"	6	102,245.83
58.	"	29	978,944.88
59.	Sept.	22	36,867.00
60.	"	27	10,413.06
61.	Oct.	15	40,621.83
62.	"	"	The following securities and cash were paid over and delivered to Stanley Weeks and Arthur B. Royce, as trustees under the Tenth Article of the will of said decedent, in the final distribution of the estate of said decedent:
			1200 shares of the preferred capital stock of the Chicago & Northwestern Railway Co.; inventoried at $100 per share..... 120,000.00
			11,000 shares of the common capital stock of the Chicago & Northwestern Railway Co.; inventoried at $100 per share..... 1,100,000.00
			600 parts. of Series 1 Participation Certificates of Chicago Railways Company; inventoried at $100 per part..... 60,000.00
			2200 shares of the capital stock of the Commonwealth Edison Company; inventoried at $100 per share..... 220,000.00
			1460 shares of Trustees' Certificate of preferred participation of Chicago City & Connecting Railways Collateral Trust; inventoried at $100 per share..... 146,000.00
			876 shares of Trustees' Certificate of common participation of Chicago City & Connecting Railways Collateral Trust; inventoried at $100 per share..... 87,600.00
			3400 shares of the capital stock of the Illinois Central Railroad Company; inventoried at $100 per share..... 340,000.00
			1500 shares of the capital stock of the Illinois Trust & Savings Bank; inventoried at $100 per share.. 150,000.00
			149 shares of the capital stock of the Merchants Loan & Trust Company; inventoried at $100 per share..... 14,900.00

Vouchers.

					200 shares of the preferred capital stock of Public Service Company of Northern Illinois; inventoried at $100 per share	$20,000.00
					6200 shares of the capital stock of the Pullman Company; inventoried at $100 per share	620,000.00
					2000 shares of the capital stock of the Iron Silver Mining Company; inventoried at $20 per share	40,000.00
					19 5% first mortgage bonds of the Chicago Gas Light & Coke Co., dated July 1, 1887, due July 1, 1937, being of the face value of $1000 each	19,000.00
					97 3% United States Government coupon bonds of 1908, due August 1, 1918; 74 of which bonds are of the face value of $500 each and 23 of which bonds are of the face value of $1000 each	60,000.00
					41 4% United States Government registered bonds of 1895, due Feb. 1, 1925; 40 of which bonds are of the face value of $10,000 each, and 1 of which bonds is of the face value of $5000	405,000.00
					8 3% United States Government Panama Canal registered bonds of 1911, due June 1, 1961; three of which bonds are of the face value of $10,000 each and five of which bonds are of the face value of $1000 each	35,000.00
					Balance due on account of deficiency decree entered against Charles S. Martin in the foreclosure proceedings upon the mortgage of Lucy E. and Jesse B. Knowles	543.46
					Cash	6,030.33
63.	Oct.	15,	1915,		Cash paid Stanley Weeks, in full for executor's fee	75,000.00
64.	"	"	"		Cash paid Arthur B. Royce, in full for executor's fee	75,000.00
65.	"	"	"		Cash paid Harry Ford, for services as bookkeeper	500.00
66.	"	"	"		Cash paid Arthur Olds & Co., for services as auditors	175.00
67.	"	"	"		Cash paid Mrs. Kate Weeks, on account of the legacy given to her under the Eleventh Article of the will of said decedent	50,000.00
68.	"	"	"		Cash paid Mrs. Weeks in full for balance of legacy given to her under the Eleventh Article of the will of said decedent	100,939.80
69.	Dec.	8,	1915,		Cash paid John A. Cervenka, Clerk, for final court costs and discharge	59.40
70.	"	"	"		Cash paid Ward, Steele & McGibbon for disbursement for publication notice in the matter of the final settlement of said estate	3.20
					Total disbursements	$6,899,341.22

RECAPITULATION.

Receipts.		Disbursements.	
Page 1	$1,521,658.57	Page 5	$ 171.61
" 2	1,047,319.93	" 6	305,357.99
" 3	3,458,169.95	" 7	928,320.37
" 4	801,489.10	" 8	4,158,240.06
" 5	70,703.67	" 9	1,507,251.19
Total	$6,899,341.22	Total	$6,899,341.22

Respectfully submitted,

STANLEY WEEKS,
ARTHUR B. ROYCE,
Executors of the Estate of
JOSEPH N. WEEKS,
Deceased.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE PROBATE COURT OF COOK COUNTY

In the Matter of the Estate of JOSEPH N. WEEKS, Deceased.

FINAL REPORT.

TO THE HONORABLE MORTON FIELD, JUDGE OF SAID COURT:

The undersigned, Stanley Weeks and Arthur B. Royce, Executors of the estate of Joseph N. Weeks, deceased, respectfully state that they submit herewith their final account of their receipts and disbursements as executors of said estate; that more than one year has elapsed since letters testamentary were issued to the undersigned as executors of said estate; that all the assets of said estate have been collected and that all debts and claims against said estate and all legacies and gifts given under the last will and testament of said decedent have been paid in full, and all property belonging to said estate has been turned over, delivered and disposed of in accordance with the terms of the last will and testament of said Joseph N. Weeks, deceased, as shown by said final account submitted herewith.

The undersigned further report that all of the property, both real, personal or mixed, described in the Second Article of the last will and testament of said decedent as given to Kate Weeks, the widow of said decedent, was located in England; that none of said property ever came into the possession or control of the undersigned as executors of said estate, and that said decedent in his lifetime transferred, conveyed and delivered all of said property described in said Second Article to his said widow, Kate Weeks.

The undersigned further report that Howard Rice, described as the nephew of said decedent in the Third Article of said will, and Lucy Ann Weeks, described as the cousin of said decedent in the Fourth Article of his will, died prior to the death of said decedent.

The undersigned further report that Mrs. Ida M. Toll, mentioned in the Seventh Article of the will of said decedent, survived said decedent, and has not contracted a second marriage, and that Ella Janvrin, named in the Eighth Article of said decedent's last will and testament, was in his employ at the time of his death.

The undersigned further report that Dwight Rice, named as the nephew of said decedent in the Third Article of his last will and testament, is *non compos mentis;* that Philip L. Rice, also named in said article, is his duly qualified and now acting conservator, and that the legacy given to said Dwight Rice in said Third Article has therefore been paid to said Philip L. Rice as conservator of the estate of said Dwight Rice.

The undersigned further report that the two items shown on the twelfth page of their final account as being paid to Kate Weeks, the widow of said decedent, in consideration of the legacy given to her under the Eleventh Article of the last will and testament of said decedent, in the aggregate represent a sum equal to one-third of the net income received by the undersigned as executors from that part of the estate of said decedent which has remained in the hands of the undersigned from time to time as executors.

The undersigned further report that all inheritance taxes which have been assessed against said estate have been paid in full; that said final account shows total receipts amounting in the aggregate to $6,899,341.22, and total disbursements amounting to $6,899,341.22.

The undersigned further report that the residuary trustees under the last will and testament of said decedent and the executors named in said will are one and the same persons; that with the exception of certain legacies the entire estate of said decedent passes to said residuary trustees and will be held by them under the terms of the last will and testament of said decedent for a considerable period.

The undersigned therefore pray that their final account be approved and that they be discharged from further duties as executors of said estate without being required to make any deposit for the purpose of securing the payment of such personal property assessments as may be assessed against said estate for the year 1915.

Respectfully submitted,

STANLEY WEEKS,
ARTHUR B. ROYCE,
Executors of the Estate of
JOSEPH N. WEEKS,
Deceased.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Stanley Weeks and Arthur B. Royce being first duly sworn on oath state that they have read the foregoing report by them subscribed; that they are familiar with the statements therein contained, and that each and all of the same are true.

STANLEY WEEKS.
ARTHUR B. ROYCE.

Subscribed and sworn to before me this
15th day of December, A.D., 1915.

JONAS COOK, *Notary Public.*

B. MASSACHUSETTS.

INVENTORY.

[The executor must file the inventory in the Registry of Probate within three months after his appointment.]

". . . *such inventory shall contain a complete list of all the assets within the knowledge of the said executor, administrator or trustee.*" (*Extract from St. 1909, c. 527, sc. 5.*)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT.

To.....L. M.....
.....N. O.....
.....P. Q.....

GREETING:

YOU are hereby appointed to appraise, on oath, the estate and effects of .....A. B. C.....
late of Boston,.....
in said County of Suffolk,.....deceased, which may be in said Commonwealth; said appraisal to be made as of the date of the death of said deceased. When you have performed that service, you will deliver this order, with your doings in pursuance thereof, to.....
.....D. E. F.....
.....the executor of the last will and testament of said deceased, that he may return the same to the Probate Court for said County of Suffolk.

Witness my hand and the seal of said Court, this.....twenty-ninth..... day of.....April.....in the year of our Lord one thousand nine hundred and fifteen.

.....R. S.....*Register of Probate Court.*

SUFFOLK, ss.....April 30th,.....A. D. 1915.
Then the above-named appraisers personally appeared and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing order.

Before me,

.....X. Y.....*Justice of the Peace.*

Pursuant to the foregoing order to us directed, we have appraised said estate as follows, to wit:

Amount of Personal Estate, as per schedule exhibited,..... $158,625.50
Amount of Real Estate, as per schedule exhibited,..... $50,000.00

.....L. M.....
.....N. O..... } *Appraisers.*
.....P. Q.....

SUFFOLK, ss.....May 10th.....A. D. 1915. Then personally appeared .....D. E. F.....
.....the executor of the will of said deceased, and made oath that the foregoing is a true and perfect inventory of all the estate of said deceased that has come to.....his.....possession or knowledge.

Before me,

.....X. Y.....*Justice of the Peace.*

Schedule of Personal Estate in Detail.

	Dolls.	Cts.
100 shares American Telephone & Telegraph Co. @ 130	13,000	
Dividend on above declared before April 1st, payable 15th	200	
50 shares Pullman Co. @ 175	8,750	
$10,000 City of Boston 4's due July, 1949 @ 103	10,300	
Accrued interest on above Jany. 1st to April 1st	100	
$10,000 United States 4's due Jany., 1925 @ 110	11,000	
Accrued interest on above Jany. 1st to April 1st	100	
Interest in partnership of J. A. X. & Co.	100,000	
Deposit in State Street Trust Co. of Boston	6,325	
Deposit in Provident Institution for Savings, with interest added to April 1st, 1915, represented by book No. 2856	961	
Cash in dwelling house	152	
Household furniture, pictures, books, silverware and household supplies of every description, being entire contents of dwelling house No. 22 Beacon Hill, Boston	3,750	
Household furniture, pictures, books, silverware and household supplies of every description, being entire contents of dwelling house Falmouth, Massachusetts	1,800	
Packard Twin Six automobile, 1915	2,000	
Surrender value of fire insurance policies on dwelling houses and furniture	187	50
	158,625	50

Schedule of Real Estate in Detail.

	Dolls.	Cts.
Lot of land, containing about 1800 square feet, with dwelling house thereon numbered 22 Beacon Hill, Boston	32,000	
About six acres of land, with dwelling house and garage thereon, on the east side of Bay Avenue, Falmouth, Mass.	18,000	
	50,000	

ACCOUNT.

[RULE IX. "No executor or administrator shall receive any compensation by way of a commission upon the estate by him administered, but shall be allowed his reasonable expenses incurred in the execution of his trust, and such compensation for his services as the Court in each case may deem just and reasonable. The account shall contain an itemized statement of the expenses incurred, and shall be accompanied by a statement of the nature of the services rendered and of such other matters as may be necessary to enable the Court to determine what compensation is reasonable."]

THE first and final ACCOUNT OF D. E. F. executor of the last will and testament of A. B. C. late of Boston, in the County of Suffolk, deceased.

This account is for the period beginning with the first day of April A. D. 1915, and ending with the twenty-ninth day of April A. D. 1916.

Said accountant charges himself with the several amounts received, as stated in Schedule A, herewith exhibited $167,721.10
and asks to be allowed for sundry payments and charges, as stated in Schedule B, herewith exhibited, ... 167,721.10
Balance as stated in Schedule C, herewith exhibited, ... $

.....D. E. F.....*Executor.*

The undersigned, being all persons.....interested, having examined the foregoing account, request that the same may be allowed without further notice.

[and acknowledge receiving the moneys and property herein charged as paid or delivered to each of us.]

.....

.....Ann C—.....John C—.....
Mary C— .....State Street Trust Co., *Trustee.*

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.....*At a Probate Court held at Boston, in said County, on the .....twentieth.....day of.....May.....* A. D. 1916.

The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having been duly notified .....*and*..... having consented thereto in writing, and no objections being made thereto, and the same having been examined and considered by the Court.

It is decreed that said account be allowed.

.....H. K.....*Judge of Probate Court.*

Schedule A.

Amount of personal property, according to inventory, or $158,625.50
Balance of next prior account, ...
Amounts received from income, gain on sale of personal property over appraised value, and from other property as follows:

Item No.	Date 1915	*100 shares American Tel. & Tel. Co.*		
1.	April 15	Dividend $2. per share	200.	
2.	July 15	" 2. " "	200.	
3.	Oct. 15	" 2. " "	200.	
	1916			
4.	Jan. 15	" 2. " "	200.	
5.			800.	
6.		Less April dividend included in inventory	200.	600.
7.	Feby. 10	Sold above shares @ 135	13,500.	
8.		Inventoried @ 130	13,000.	
9.		Gain	500.	500.

Item No.	Date.				
	1915		*50 shares Pullman Company.*		
10.	May 15	Dividend $2. per share		$100.	
11.	Aug. 15	" 2. " "		100.	
12.	Nov. 15	" 2. " "		100.	
	1916				
13.	Feby. 15	" 2. " "		100.	$400.
14.	" 20	Sold above shares @ 175		8,750.	
	1915		*$10,000. City of Boston 4's.*		
15.	July 1	Six months' interest to date		200.	
	1916				
16.	Jany. 1	" " " " "		200.	
17.	Mch. 1	Accrued interest to date		66.66	
18.				466.66	
19.		Less three months' interest included in inventory		100.	366.66
20.	" 1	Sold above bonds @ 102		10,200.	
21.		Inventoried @ 103		10,300.	
	1915		*$10,000. United States 4's.*		
22.	Apr. 1	Three months' interest to date		100.	
23.	July 1	" " " " "		100.	
24.	Oct. 1	" " " " "		100.	
	1916				
25.	Jany. 1	" " " " "		100.	
26.	Mch. 1	Two " " " "		66.66	
27.				466.66	
28.		Less included in inventory		100.	366.66
29.	Mch. 1	Sold above bonds @ 112		11,200.	
30.		Inventoried @ 110		11,000.	
31.		Gain		200.	200.00
	1915		*Partnership Interest of J. A. X. & Co.*		
32.	May 1	Received on account of liquidation		25,000.	
33.	Aug. 1	" " " " "		20,000.	
34.	Nov. 1	" " " " "		25,000.	
	1916				
35.	Feby. 1	" " " " "		30,000.	
36.	Mch. 1	" final payment		6,320.	
37.				106,320.	
38.		Inventoried at		100,000.	
39.		Gain		6,320.	6,320.
40.		Interest on deposit in Provident Institution for Savings to Jan. 15, 1916			27.50
41.		From daughter, and trustee for widow of testator, the inventory value of fire insurance policies		187.50	
42.		Interest for twelve months on daily balances in State Street Trust Company			314.78
43.					$167,721.10

SCHEDULE B.

Item No.	Date.				
	1915		Showing payments, charges, losses and distributions, etc.		
44.	Apr.	30	Dr. A. B., professional services to testator		$75.
45.			A. J. W. & Sons, funeral expenses		200.
46.			Miscellaneous household bills (should be itemized)		165.80
47.	June	1	Services of three appraisers @ $25. each		75.
48.			Rent of safe-deposit box		10.
49.	Oct.	1	Commonwealth of Massachusetts, succession taxes		1,760.
50.			State of Illinois, succession taxes on shares of American Tel. & Tel. Co. & Pullman Co		275.
51.			Boston Daily Advertiser, publishing citations		5.40
52.			Register of Probate, certified copies of will and certificates of Executor's appointment		6.10
53.	Nov.	1	City of Boston, taxes on personal estate		1,780.
	1916				
	Mch.	1	Sold $10,000. City of Boston 4's:		
54.			Inventoried @ 103	10,300.	
55.			Sold @ 102	10,200.	
56.			Loss	100.	100.
57.			M. P. & R., legal services		250.
58.	Apr.	29	State Street Trust Co., Trustee for widow of testator, as per Clause E of will		75,000.
59.			To said Trustee, interest on above at 4% per annum in four payments of $750. each, July, Oct., Jany. and March 31st		3,000.
60.			Transferred and delivered to widow of testator contents of dwelling house in Boston, as per clause A of will		3,750.
61.			To said State Street Trust Co., Trustee for daughter of testator, legacy, as per Clause F of will		50,000.
62.			To said Trustee interest on above at 4% per annum in 4 payments of $500. each, July, Oct., Jany. and March 31st		2,000.
63.			Transferred and delivered to daughter of testator contents of dwelling house, Falmouth, Mass., as per clause B of will		1,800.
64.			To testator's son, all the rest, residue and remainder of this estate, including automobile inventoried at $3,000, and savings-bank book representing the sum inventoried $961 with interest added thereon to Jany. 15th, 1916, $27.50, as per clause G of will		24,718.80
65.			Executor's charge for services		2,750.
66.					167,721.10

SCHEDULE C.

[This schedule contains all items of personal property now in possession of the accountant, including cash.]

None.

No.

EXECUTOR'S ACCOUNT.

Filed .....19 .
Returnable.....19 .
Allowed .....19 .
For Petitioner:

.....

.....

For Respondent:

.....

.....

SUFFOLK, ss.

April 29, A.D. 1916.

Then appeared the within-named .....D. E. F..... and made oath that the within account is just and true. Before me,

.....X. Y.....

Justice of the Peace.

C. NEW YORK.

TRANSFER TAX AFFIDAVIT.[1]

SURROGATES' COURT
COUNTY OF NEW YORK

In the Matter of the Transfer Tax upon
the Estate of

JOHN DOE,

Deceased

STATE OF NEW YORK,
County of New York, } *ss.:*
City of New York.

.....Richard Roe.....administrator of the estate of the above-named decedent being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under the Law in Relation to Taxable Transfers of Property, deposes and says:

I. — That the said decedent died a resident of the County of New York, State of New York, on the.....6th day of August.....1915, Intestate, and that Letters of Administration were duly issued by the said Surrogates' Court of New York County on the .....5th day of.....September .....1915, to this deponent, whose post office address is.....690 Nassau Street, New York City, New York.....
.....
.....
.....

II. — That as such administrator deponent is personally familiar with the affairs of said estate, the property constituting the assets thereof and their fair market value, and with the debts, expenses and charges properly and legally allowable as deductions therefrom. That the decedent at the time of his death had no safe deposit box except one at United States Deposit Company, New York City.

III. — *Schedule A*1 sets forth each and every parcel of real estate in the State of New York of which decedent died seized and possessed, or in which he had any right, title or interest, and the liber and page of the record of the con-

NOTE — This affidavit and schedules, with will, etc., must be filed in triplicate — one original and two copies — with one certified copy of petition and order appointing Appraiser.

[1] In New York the practice of filing an inventory of an estate as distinguished from Inheritance Tax proceedings has become unusual. The place of an inventory is taken by the Inheritance or Transfer Tax affidavit of the administrator or executor, listing all the property of the decedent. An official appraiser is appointed, who makes a report fixing the Transfer Tax. If the Transfer Tax affidavit is carefully drawn, the appraiser will usually follow it, although this is of course not necessarily true. This report is usually made the starting point in preparing the account at the conclusion of the administration of the estate. — ED.

veyance thereof; together with a statement of the mortgages and other encumbrances thereon at the date of death, giving the amount of such encumbrances and date, place, liber and page of record thereof. It also sets forth in the first marginal column the assessed valuation of said parcels and in second marginal column the estimated market value thereof (as appraised by a competent expert in real estate values, whose supplemental affidavit is herewith submitted).

*Schedule A*2 sets forth all of the moneys left by the decedent at the time of his death, whether in his immediate possession, standing to his credit or in which he had any right, title or interest, in banks of deposit, savings banks, trust companies, or other institutions, whether individually or in trust for or jointly with any other person, giving also separately the accrued interest thereon, if any, down to the last interest day prior to decedent's death in the case of savings accounts, and down to the date of decedent's death in all other cases.

*Schedule A*3 sets forth all wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses, carriages, automobiles, boats, and any and all other personal chattels of whatsoever kind or nature, left by the decedent, together with the fairly estimated market value thereof (as appraised by a competent expert, whose supplementary affidavit is herewith submitted). It also contains a statement of all bonds and mortgages held by decedent and of all claims due and owing decedent at the time of his death, and of all the promissory notes or other instruments in writing for the payment of money of which he died possessed, of whatsoever nature, with interest thereon, if any (except such as are included in the statement of the decedent's interest in a co-partnership or business set forth in *Schedule A*5) giving the face values and estimated fair market values thereof and if such estimated fair market values be less than the face value, setting forth in brief the reason for such depreciation as to each item. Said *Schedule A*3 also contains a statement of any and all moneys payable to the estate from life insurance policies carried by decedent.

*Schedule A*4 sets forth all the corporate stocks, bonds and accrued interest thereon to the date of decedent's death, or other investment securities owned by the decedent at the time of his death, with the market value thereof at such time, and in the case of unlisted corporate securities giving the State of incorporation of the corporation issuing the same, its capitalization, the value and nature of its assets, its liabilities, its surplus, the book value of its stock, the dividends paid, and any other facts which may be pertinent affecting the value of said securities, also the amount of any dividends declared on such stocks but unpaid at date of death.

*Schedule A*5 sets forth the interest of decedent at the time of his death in any co-partnership or business, a balance sheet of such business, and shows the nature and location thereof, the total capital employed, the gross profits, expenses and net profits, of the business for at least three years prior to decedent's death, and any other facts pertaining to such business as may be pertinent to a fair and just appraisal of decedent's interest in said business and the good-will thereof. (Submitted to the Appraiser herewith is a certificate and two copies thereof showing the amount of the decedent's interest in such business and good-will thereof, made by a competent accountant.)

*Schedule A*6 sets forth in itemized form, together with the fair market value thereof, any other property owned or left by decedent at the time of his death and not included in the preceding schedules.

IV. — *Schedule B*1 sets forth the funeral expenses. *Schedule B*2 sets forth the expenses of administration and counsel fees paid or estimated. *Schedule B*3

sets forth the valid debts due and owing by decedent at the time of his death and allowed as just and fair by the administrator, together with a separate list of such claims as have been contested or rejected by him (except liens and incumbrances upon real estate and except such as enter into the computation of decedent's interest in any co-partnership or business as set forth in *Schedule A*5). *Schedule B*3 also sets forth all items claimed by the administrator as proper deductions herein, and not included in the prior schedules.

V. — *Schedule C* sets forth all the property, real and personal, which passed at decedent's death by virtue of the exercise by him of any power of appointment vested in him by the will, deed or other instrument of another, together with the fair market value of each item thereof and a statement in brief of the source and derivation of such power, copies of which will, deed or other instrument are submitted herewith. Said *Schedule C* also sets forth the interest of decedent in any estate of another; and any property wheresoever situated of which decedent made any grant, bargain, sale or gift in contemplation of death or intended to take effect in possession or enjoyment at or after the death of decedent.

VI. — *Schedule D* contains a statement of the names of all persons beneficially interested in this estate at the time of decedent's death, the nature of their respective interests, their relationship, if any, to the decedent, together with the ages at the time of decedent's death of all minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement showing which of the beneficiaries named in decedent's will, if any, died prior to decedent, the dates of their deaths, their survivors, and the relationship of such survivor to decedent.

VII. — That deponent has made due and diligent search for property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in Schedules A and C, and that no information of any other property of the decedent has come to his knowledge, and that he verily believes that decedent left no property except as therein set forth. That all the sums claimed as deductions in *Schedule B* are lawful, just and fair, that to the best of deponent's knowledge, information and belief the decedent made no gift, grant or conveyance of any property, real or personal, in contemplation of death, or to take effect at or after death, except as may be so specifically set forth in the appropriate schedule.

Deponent further says that wherever in any of said schedules the word "none" has been written or wherever such schedule has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which schedule relates.

Sworn to before me this..12th..day
of September...., 1915

RICHARD ROE.

JOSEPH F. ROBINSON, *Notary Public*,
New York County.

(Here follow the detailed schedules and supplemental affidavit referred to in the above affidavit.)

SCHEDULE. — *A*1. REAL PROPERTY.

	Assessed value For year of decedent's death.	Estimated Market value.
None		

NOTE. — Kindly annex appraisal made by Expert Real Estate Appraiser, and if Mortgages exist, give liber and page of record, name of mortgagee, date of mortgage, amount of mortgage, rate of interest, date when payable, and amount of accrued interest to date of decedent's death.

SCHEDULE. — *A*2. CASH ON HAND AND ON DEPOSIT.

	Amount.
Cash in dwelling house leased by decedent	$127 00
Deposit in Bank for Savings, New York City, with interest added to July 1, 1915	673 00
Deposit in United States Mortgage & Trust Company	4,927 00
Accrued interest thereon to August 6, 1915, date of decedent's death	50 23
	$5,777 23

NOTE. — Kindly add interest on above to last interest day preceding date of death.

SCHEDULE. — *A*3. PERSONAL CHATTELS — BONDS AND MORTGAGES, PROMISSORY NOTES, CLAIMS, INSURANCE, ETC.

	Estimated market value.
Wearing apparel of decedent	$100 00
Gold watch	450 00
Diamond and sapphire scarf pin	90 00
Household furniture, etc., being entire contents of dwelling house leased by decedent at No. 850 West 35th Street, listed and appraised with gold watch and scarf pin above mentioned in supplemental affidavit of James Smith, verified September 12, 1915, hereto annexed	2,785 00
Surrender value of fire insurance policies on above household furniture, etc.	3 75
Note for $1,000 made by Thomas Hunt to order of testator. Said note is dated August 6, 1910, and became due August 6, 1911, with interest @ 6%	1,000 00
Accrued interest thereon	300 00
	$4,728 75

NOTE. — Kindly add interest accrued to date of death on all above.

SCHEDULE. — *A4.* CORPORATE BONDS AND STOCKS (INCLUDING INTEREST ON BONDS TO DATE OF DEATH AND STOCK DIVIDENDS DECLARED BUT UNPAID.)

	Estimated market value.
$10,000 United States 4's due 1925 @ 110	$11,000 00
Accrued interest on above to August 6	40 00
100 Shares American Telephone & Telegraph Co. @ 130	13,000 00
Dividend on above declared before August 1, payable August 25th	200 00
50 shares Pullman Company @ 175	8,750 00
	$32,990 00

NOTE. — Kindly add interest on all bonds to date of death and stock dividends declared but unpaid; and give prices of listed securities, and in case of close corporations and unlisted securities, statement of assets and liabilities and net earnings for 3 years prior to decedent's death, where no sales have been made.

SCHEDULE. — *A5.* INTEREST OF DECEDENT IN ANY CO-PARTNERSHIP OR BUSINESS, TOGETHER WITH BALANCE SHEET AND PROFIT AND LOSS STATEMENT.

	Estimated market value.
Interest in the firm of Doe & Hill, Druggists, in the City of New York, composed of said decedent and Joseph Hill, and in which the said decedent owned a one-half interest. The estimated value of the decedent's share as taken from the balance sheet and profit and loss statement of the said partnership is given below [1]	$63,582 00

NOTE. — Give statement of assets and liabilities as of date of death and, in addition, net profits for at least 3 years preceding date of death, and trial balances for same period.

SCHEDULE. — *A6.* PROPERTY LEFT BY DECEDENT OF WHATEVER KIND OR NATURE NOT INCLUDED IN THE FOREGOING SUB-SCHEDULES.

	Estimated market value.
None	

NOTE. — State here claims by estate in litigation or property of a similar nature, etc.

[1] Here would follow the balance sheet of the partnership as of the date of decedent's death and a further statement showing the net profits for at least three years preceding the date of death and trial balances for the same period. No fixed form is prescribed for these statements which are intended to aid the appraiser in fixing the correct value of the partnership interest and should be in the form customarily used in the business. — Ed.

SCHEDULE. — *B*1. FUNERAL EXPENSES.

	Claimed.
Jones & Brown, Undertakers, for burial of decedent and erection of headstone	$685 00

NOTE. — If claim is made for monument, this schedule must state whether contracted for or not.

SCHEDULE. — *B*2. ADMINISTRATION EXPENSES.

	Claimed.
Webster & Lincoln, attorneys for administrator, for legal services in probating will, general settlement of estate and preparation and filing of final account (estimated)	$2,750 00
Advertising	69 00
Fee of appraiser — James Smith	50 00
	$2,869 00

NOTE. — Commissions of Ex'r or Adm'r must be stated separately from counsel fees, etc., and will be figured by Appraiser.

SCHEDULE. — *B*3. DEBTS OF DECEDENT. ALSO DEDUCTIONS CLAIMED AND NOT INCLUDED IN THE PRECEDING SUB-SCHEDULES.

	Claimed.
John W. Brown, M.D., for professional services	$105 00
Wages of servants in dwelling house of decedent	65 00
	$170 00

NOTE. — State what dues are paid or will be paid. If any claims contested, state so.

SCHEDULE C. — PROPERTY PASSING BY DECEDENT'S EXERCISE OF ANY POWER OF APPOINTMENT; INTEREST OF DECEDENT IN ANY OTHER ESTATE; PROPERTY TRANSFERRED BY DECEDENT IN CONTEMPLATION OF DEATH OR TO TAKE EFFECT AT DEATH.

	Estimated value.
None	

NOTE. — State any transfers by way of gifts made prior to death under Trust Deeds or any other instrument.

SCHEDULE D. — BENEFICIARIES AND THEIR INTERESTS, RELATIONSHIP TO DECEASED, ETC.

Mary Doe, widow of decedent, one-third of residuary estate.
Harold Doe, son of decedent, one-third of residuary estate.
Elizabeth Doe, daughter of decedent, one-third of residuary estate.

NOTE. — Where will creates life estates, annuities or estates for term of years, give age of beneficiaries at date of decedent's death. State whether beneficiaries are living at date of appraisal.

SUPPLEMENTAL AFFIDAVIT.

SURROGATES' COURT
COUNTY OF NEW YORK

In the Matter of the Appraisal under the Transfer Tax Law of the Estate of

JOHN DOE,

Deceased.

STATE OF NEW YORK, }
County of New York } *ss:*

James Smith, being duly sworn, deposes and says: I am a dealer and importer of furniture, paintings and bric-a-brac, etc., doing business at No. 67 W. 57th Street, in the Borough of Manhattan, City of New York. I am actively engaged in the conduct of the aforementioned business and I am frequently called upon to appraise furniture, paintings, bric-a-brac, jewelry, etc. I have been accustomed to appraise articles of the above description for the past twelve years and am considered an experienced and expert appraiser.

I personally examined and appraised the jewelry, furniture and personal effects belonging to this estate. The articles I examined consisted of the several articles enumerated in the annexed schedule.[1] The value of each of said articles on the 6th day of August, 1915, was the sum set opposite such article in the annexed schedule and the aggregate value thereof on said date was 3,425.00.

Sworn to before me this . . 12th . . *day of* September . . . . , 1915

JAMES SMITH.

JOSEPH F. ROBINSON, Notary Public,
New York County.

[1] The above schedule referred to consists simply of a list of these articles with the appraised value set opposite each. — Ed.

ACCOUNT.

SURROGATES' COURT,
COUNTY OF NEW YORK.

In the Matter of the Judicial Settlement of the Acount of Richard Roe, administrator of the Goods, Chattels and Credits of

JOHN DOE,

Deceased.

Account of proceedings.

TO THE SURROGATES' COURT OF THE COUNTY OF NEW YORK.

I, Richard Roe, of the County of New York, do render the following account of my proceedings as administrator of John Doe, deceased: On the 5th day of September, 1915, Letters of Administration were issued to me. On the 12th day of September, 1915, I caused a transfer tax affidavit containing an inventory of personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisement by the transfer tax appraiser duly appointed, to $107,077.98.

*Schedule A*1, hereto annexed, contains a statement of all the property listed and described in said inventory, sold by me at public or private sale, with the prices and manner of sale; which sales were fairly made by me at the best prices that could then be had, with due diligence, as I then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest or moneys received by me for which I am legally accountable.

*Schedule A*2, hereto annexed, contains a statement of income collected by me from the time of my qualification as administrator to the date of this account.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectible by me together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident, without any willful default or negligence, the cause of its loss and appraised value. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules *A* and *B*.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for funeral and other necessary expenses for said estate, together with the reasons and objects of such expenditure.

On or about the 10th day of September in the year 1915, I caused a notice for claimants to present their claims against the said estate to me within the period fixed by law, and at a certain place therein specified, to be published in two newspapers, according to law, for six months, pursuant to an order of the Surrogate of the County of New York; to which order, notice and due proof of publication herewith filed, I refer as part of this account.

Schedule D, hereto annexed, contains a statement of all the claims of creditors, presented to and allowed by me or disputed by me and for which judgment or decree has been rendered against the estate together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment; it also contains a statement of all moneys paid by me to the creditors of the deceased, and their names, and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow, or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled as widow, legatee, or next of kin of the deceased, to a share of his estate, with their places of residence, degree of relationship, and a statement of which of them are minors and whether they have any general guardian, and if so, their names and places of residence, to the best of my knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting my administration of said estate, my rights and those of others interested therein.

I charge myself as follows:

With amount of Inventory	$107,077.98	
" " " Increase, as shown by *Schedule A1*	500.00	
With amount of Income, as shown by *Schedule A2*.	1,249.87	
		$108,827.85

I credit myself as follows:

With amount of Loss on sales, as per *Schedule B*....		
With amount Debts not collected as per *Schedule B*	1,300.00	
With *Schedule C*	2,054.00	
With *Schedule D*	170.00	
With *Schedule E*	30,000.00	
		33,524.00
Leaving a balance of		$75,303.85

all of which is principal, to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions and the expenses of this accounting. The said schedules, which are severally signed by me, are part of this account.

RICHARD ROE,
Administrator.

SCHEDULE A1.

CASH RECEIVED FROM PROPERTY SOLD AND DEBTS COLLECTED.

1915			
Sept.	15	Received for $10,000 United States 4's due 1925 at 110 ..	$11,000.00
"	15	Accrued interest on $10,000 U. S. 4% bond due 1925.....	40.00
Oct.	15	Dividend on 100 shares of American Telephone & Telegraph Co., declared before August 1, 1915, payable August 15, 1915	200.00
"	20	Received from Joseph Hill, surviving partner in the firm of Doe & Hill, for one-half interest in the firm of Doe & Hill, druggists in the City of New York, at appraised valuation	63,582.00

Dec.	1	Sold at private sale to the heirs and next of kin of decedent, the wearing apparel of decedent, gold watch, diamond and sapphire scarf pin and household furniture belonging to the decedent, at the appraised valuation.	3,425.00
"	1	Paid by heirs and next of kin, surrender value of fire insurance policies on above household furniture of decedent	3.75
1916			
May	20	Received for 50 shares Pullman Co. at 175	8,750.00
July	20	Received for 100 shares American Telephone & Telegraph Co. at 135	13,500.00
		Total	$100,500.75

Received for 100 shares of American Telephone & Telegraph Co. as above stated	$13,500.00
Inventory or appraised value of same	13,000.00
Increase over inventory or appraised value	$500.00

RICHARD ROE,
Administrator.

SCHEDULE A2.

INCOME COLLECTED.

1915			
Aug.	15	Dividend $2 per share on 50 shares of Pullman Co.	$100.00
Oct.	15	Dividend $2 per share on 100 shares of American Tel. & Tel. Co.	200.00
Nov.	15	Dividend $2 per share on 50 shares of Pullman Co.	100.00
1916			
Jan.	15	Dividend $2 per share on 100 shares of American Tel. & Tel. Co.	200.00
Feb.	15	Dividend $2 per share on 50 shares of Pullman Co.	100.00
Apr.	15	Dividend $2 per share on 100 shares of American Tel. & Tel. Co.	200.00
May	15	Dividend $2 per share on 50 shares of Pullman Co.	100.00
July	15	Dividend $2 per share on 100 shares of American Tel. & Tel. Co.	200.00
Aug.	1	Interest on deposit U. S. Mortgage & Trust Co.	49.87
			$1,249.87

RICHARD ROE,
Administrator.

SCHEDULE B.

LOSS ON SALES AND DEBTS NOT COLLECTED.

Note for $1,000 made by Thomas Hunt to order of decedent. Said note was dated August 6, 1910, and became due August 6, 1911, with interest at 6%. This note with the interest thereon is uncollectible inasmuch as the maker has been discharged in bankruptcy since the making of the note and no dividend was paid by his estate in bankruptcy. The administrator only became aware of these bankruptcy proceedings after the appraisal herein	$1,300.00

RICHARD ROE,
Administrator.

SCHEDULE C.

Funeral and Administration Expenses.

1915			
Oct.	1	Jones & Brown, undertakers, for burial of decedent and erection of headstone	$ 685.00
"	1	Webster & Lincoln, attorneys for administrator, for legal services in securing letters of administration and general settlement of estate	1,250.00
"	1	Advertising for claims of creditors	69.00
"	1	Fee of appraiser, James Smith	50.00
1916			
Feb.	1	Paid to Comptroller of State of New York for transfer tax on the estate	839.37
			$2,893.37

Richard Roe,
Administrator.

SCHEDULE D.

Creditors Paid.

1915			
Oct.	1	John W. Brown, M.D., for professional services	$105.00
"	1	Wages of servants in dwelling house of decedent	65.00
			$170.00

Richard Roe,
Administrator.

SCHEDULE E.

Moneys Paid to Beneficiaries.

1916			
May	1	Paid to Mary Doe, widow of decedent	$10,000.00
"	1	Paid to Harold Doe, son of decedent	10,000.00
"	1	Paid to Thomas Laxton, guardian for Elizabeth Doe, daughter of decedent	10,000.00
			$30,000.00

Richard Roe,
Administrator.

SCHEDULE F.

Names, Addresses, and Relationships of Beneficiaries.

Name.	*Address.*	*Relationship.*
Mary Doe	100 Fifth Ave., New York City	Widow of decedent
Harold Doe	30 Madison Ave., New York City	Son of decedent
Elizabeth Doe	100 Fifth Ave., New York City	Daughter of decedent

All of the above named persons are of full age and of sound mind with the exception of Elizabeth Doe, who is a minor over the age of fourteen years and for whom Thomas Laxton who resides at No. 1 Fifth Avenue, New York City, is general guardian.

Richard Roe,
Administrator.

SURROGATES' COURT,
COUNTY OF NEW YORK

In the Matter of the Judicial Settlement of the Account of

JOHN DOE,

Deceased.

COUNTY OF NEW YORK, *ss.:*

Richard Roe, of the City and County of New York, being duly sworn, says that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by him to creditors, legatees and next of kin, and for necessary expenses, are correct; that he has been charged therein all the interest for moneys received by him and embraced in said account, for which he is legally accountable; that the moneys stated in said account as collected were all that were collectible, according to the best of his knowledge, information and belief, on the debts stated in such account at the time of the settlement thereof; that the allowances in said decrease in value of any assets, and charges therein, for the increase in such value, are correctly made; and that he does not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in said estate. And deponent further says that the sums, under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are produced, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged; and that said account contains, to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate of said decedent, and of all money and other property belonging to said estate which have come into his hands, or which have been received by any other person by his order or authority for his use, and that he does not know of any error or omission in the account to the prejudice of any creditor of or person interested in the estate of the decedent.

RICHARD ROE.

Sworn before me this 6th day of September, 1916.

JOSEPH F. ROBINSON, *Notary Public,*
New York County.

DECREE.

At chambers of the Surrogate's Court, held in and for the County of New York, at the Hall of Records, in the County of New York, on the.....19th.....day of ..October,..in the year one thousand nine hundred and...sixteen.....

Present,

Honorable GEORGE L. JONES, *Surrogate.*

In the Matter of the Judicial Settlement of the Account of Proceedings of....Richard Roe.....
.....
.....
as Administrator of the Goods, Chattels and Credits of John Doe.....
Deceased.

.....Richard Roe.....Administrator.....of the Goods, Chattels and Credits of John Doe.....
deceased late of..the City and County of New York.....
having heretofore filed a petition, verified on the.....6th.....day of .....September.....1916, in which application was made to the Surrogate of the County of New York, for a judicial settlement of.....the.....account of such Administrator..and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of said deceased, citing them to show cause before the said Surrogate, at his office in the County of New York, on the.....2d.....day of.....October.....1916, at ten thirty o'clock in the forenoon of that day, why the account of said Administrator should not be judicially settled, and the said citation having been returned with proof of the due service thereof on Mary Doe, Harold Doe, Elizabeth Doe and on John Burns, Esq., designated by the Surrogate by an order dated the 6th day of September, 1916, to accept service of said citation on behalf of said infant.

The following persons in interest have waived the issuance and service of citation and consent that a decree be made settling the account as filed, to wit:

and the said Administrator having appeared on the return day of said citation and the said Administrator having rendered his account under oath, before the said Surrogate; and the said account having been filed,

and the said matter having been duly adjourned to this day, the said Surrogate, after having examined the said account, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, to wit:

A SUMMARY STATEMENT of the account of....Richard Roe.....
Administrator.....of the Goods, Chattels and Credits of.....
John Doe.....deceased, made by the Surrogate as judicially settled.

The said Administrator is chargeable as follows:

With amount of Inventory according to the report of the Transfer Tax Appraiser	$107,077.98	
With amount of increase on sales over appraised valuations per *Schedule A*1 of said acct	500.00	
With amount of income per *Schedule A*2 of said account	1,249.87	
		$108,827.85

The said Administrator is credited as follows:

With amount of Loss on sales as per *Schedule B*	0	
Debts not collected per *Schedule B*	$1,300.00	
Funeral and other expenses as per *Schedule C*	2,893.37	
Payments to creditors as per *Schedule D*	170.00	
Payments to next of kin (legatees) as per *Schedule E*	30,000.00	
		$34,363.37

leaving a cash balance in the hands of Administrator of $74,464.48.

And it appearing that the said Administrator has.....fully accounted for all the moneys and property of the estate of said deceased, which have come into..his....hands as such Administrator.....and his..account having been adjusted by the said Surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled.

And it is further ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the Administrator he retain the sum of Twelve hundred sixty dollars and seventy-seven cents ($1260.77) for the commissions[1] to which he..is.....entitled on this accounting, and that..he....retain the sum of Eight hundred and seventy-five.....dollars and....one..... cent ($875.01) for his counsel fees, costs and disbursements on this accounting.

And it is further ordered, adjudged and decreed, that the said Administrator pay to John Burns, Esq., special guardian for Elizabeth Doe, the sum of $500 as and for his costs on this accounting.

And it is further ordered, adjudged and decreed that the said Administrator distribute the balance of $71,828.70 remaining in his hands as follows: to Mary Doe, Twenty-three thousand nine hundred forty-two dollars and ninety cents ($23,942.90); to Harold Doe, Twenty-three thousand nine hundred forty-two dollars and ninety cents ($23,942.90); to Thomas Laxton, Guardian for Elizabeth Doe, Twenty-three thousand nine hundred forty-two dollars and ninety cents ($23,942.90).

GEORGE L. JONES,
Surrogate.

[1] Five per cent on first one thousand dollars; two and one half per cent on next ten thousand dollars, and one per cent on all sums in excess of eleven thousand dollars (New York Code Civ. Procedure, Sec. 2753).

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